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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----X	:	
<b>In re</b>	:	<b>Chapter 11</b>
	:	
<b>SEARS HOLDINGS CORPORATION, et al.,</b>	:	<b>Case No. 18-23538 (RDD)</b>
	:	
<b>Debtors.<sup>1</sup></b>	:	<b>(Jointly Administered)</b>
	:	
-----X		

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: Sears Holdings Corporation (0798); Kmart Holding Corporation (3116); Kmart Operations LLC (6546); Sears Operations LLC (4331); Sears, Roebuck and Co. (0680); ServiceLive Inc. (6774); SHC Licensed Business LLC (3718); A&E Factory Service, LLC (6695); A&E Home Delivery, LLC (0205); A&E Lawn & Garden, LLC (5028); A&E Signature Service, LLC (0204); FBA Holdings Inc. (6537); Innovel Solutions, Inc. (7180); Kmart Corporation (9500); MaxServ, Inc. (7626); Private Brands, Ltd. (4022); Sears Development Co. (6028); Sears Holdings Management Corporation (2148); Sears Home & Business Franchises, Inc. (6742); Sears Home Improvement Products, Inc. (8591); Sears Insurance Services, L.L.C. (7182); Sears Procurement Services, Inc. (2859); Sears Protection Company (1250); Sears Protection Company (PR) Inc. (4861); Sears Roebuck Acceptance Corp. (0535); SR – Rover de Puerto Rico, LLC (f/k/a Sears, Roebuck de Puerto Rico, Inc.) (3626); SYW Relay LLC (1870); Wally Labs LLC (None); SHC Promotions LLC (9626); Big Beaver of Florida Development, LLC (None); California Builder Appliances, Inc. (6327); Florida Builder Appliances, Inc. (9133); KBL Holding Inc. (1295); KLC, Inc. (0839); Kmart of Michigan, Inc. (1696); Kmart of Washington LLC (8898); Kmart Stores of Illinois LLC (8897); Kmart Stores of Texas LLC (8915); MyGofer LLC (5531); Rover Brands Business Unit, LLC (f/k/a Sears Brands Business Unit Corporation) (4658); Sears Holdings Publishing Company, LLC. (5554); Sears Protection Company (Florida), L.L.C. (4239); SHC Desert Springs, LLC (None); SOE, Inc. (9616); StarWest, LLC (5379); STI Merchandising, Inc. (0188); Troy Coolidge No. 13, LLC (None); BlueLight.com, Inc. (7034); Sears Brands, L.L.C. (4664); Sears Buying Services, Inc. (6533); Kmart.com LLC (9022); Sears Brands Management Corporation (5365); and SRe Holding Corporation (4816). The location of the Debtors' corporate headquarters is c/o M-III Partners, LP, 1700 Broadway, 19<sup>th</sup> Floor, New York, NY 10019.

**DEBTORS' OBJECTION TO SUBSTANTIAL  
CONTRIBUTION APPLICATION OF PEARL GLOBAL INDUSTRIES LTD.**

TO THE HONORABLE ROBERT D. DRAIN,  
UNITED STATES BANKRUPTCY JUDGE:

Sears Holdings Corporation and its debtor affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “**Debtors**” and, together with their non-debtor affiliates, the “**Company**”), hereby object to the *Application of Pearl Global Industries Ltd. For Allowance of Reasonable Compensation, Pursuant to Bankruptcy Code §§ 503(b)(3)(D) and 503(b)(4), for making a “Substantial Contribution” in These Cases* [ECF No. 9130] (the “**Application**”)<sup>2</sup> filed by Pearl Global Industries, Ltd. (“**Pearl**”):

**Debtors' Objection**

1. The Application should be denied. Pearl has failed to satisfy the stringent standard required and cannot demonstrate it made a substantial contribution to these chapter 11 cases.

2. Pearl’s Application rests on the theory that Pearl provided a substantial contribution with respect to the administrative claims Settlement Program approved in connection with confirmation of the Plan and Pearl’s representation of numerous administrative creditors. This theory is incorrect. Pearl cannot claim any credit for the Settlement Program. On the contrary, the record is clear that Pearl, through its counsel, objected on its own behalf, as an *individual* creditor, to the Settlement Program and plan confirmation in its *Objection to Confirmation of Amended Plan* [ECF No. 4730] (the “**Plan Objection**”), which took up a substantial amount of time in the two (2) days contested confirmation hearing, costing the estates hundreds of thousands of dollars, if not more, in administrative expenses. In opposing the

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<sup>2</sup> Capitalized terms used herein but not otherwise defined shall have the meaning ascribed to them in the Application.

Settlement Program, Pearl was acting solely for its own interest and not for the benefit of all administrative creditors, as clearly demonstrated by Pearl's determination to settle its Plan Objection in exchange for the allowance of its administrative expense claim, a waiver of potential preference claims against Pearl and a de minimis \$1 million contribution from the professional fee escrow, which the Court ultimately required on its own.

3. As stated on the record at the first day of the confirmation hearing, a group of creditors represented by Foley & Lardner LLP (the "**Foley Group**"), in conjunction with the Debtors and UCC began negotiating the Settlement Program in September 2019, a month prior to the confirmation hearing. *See In re Sears Holding Corp.*, Case No. 18-2353 (RDD) Hr'g Tr. 191:14 (Bankr. S.D.N.Y. Oct. 3, 2019) ("**TR1**") which is annexed hereto as **Exhibit A**. Pearl's counsel, DHC, attended two (2) meetings, purportedly on behalf of a different ad hoc group of vendors; however, DHC did not participate beyond these two (2) meetings, after it became evident that DHC did not represent other vendors for this purpose.

4. As Pearl admits, the Foley Group and the UCC negotiated the Settlement Program with the Debtors. *See* Wander Declaration ¶ 20; TR1 187:3-192:4. The Debtors acknowledged the contribution of the Foley Group and its counsel, but not Pearl or its counsel, on the record. *See In re Sears Holding Corp.*, Case No. 18-2353 (RDD) Hr'g Tr. 186:15 (Bankr. S.D.N.Y. Oct. 7, 2019) ("**TR2**") which is annexed hereto as **Exhibit B**. The Foley Group represented creditors with far greater claims than Pearl, and the Debtors engaged in negotiations with the Foley Group and the UCC and not Pearl, on the terms of the Settlement Program. Not only did Pearl and its counsel not have any involvement in developing or negotiating the Settlement Program, as stated, Pearl opposed approval of the Settlement Program at the confirmation hearing and demanded that it be carved out.

5. Following the meetings that Pearl attended, Pearl was purely focused on its individual recovery, not on a global resolution for administrative expense creditors generally. Indeed, during a colloquy with the Court, Pearl argued that because the Debtors' agreed with a portion of Pearl's asserted administrative expense claim that it should be paid the full amount of the agreed claim ahead of other claimants who settle with the Debtors for a discount pursuant to the Settlement Program. *See* TR1 40:22. The Court rejected Pearl's argument and noted that a motivation for the Settlement Program in part was to allow administrative expense creditors to get paid prior to the effective date, rather than wait to get 100 cents on the dollar which is consistent with the Second Circuit case law. *See* TR1 39:23 and 40:22-41:3.

6. As the Court is aware, the Debtors' plan has not gone effective. Not all administrative claims have been satisfied (not even up to the reduced caps). Remaining general unsecured creditors have not received any distribution. Nonetheless, Pearl asks the Debtors to pay it over \$200,000 in exchange for the purported benefit that it achieved for the Debtors' estates and the Debtors' creditors though its individual opposition to the Settlement Program and plan confirmation that was ultimately withdrawn. It is important to note that Pearl is not unique. There were other creditors who objected to the Settlement Program and Confirmation, and should the Court grant Pearl's Application, it would open the flood gates for other creditors to file similar motions of substantial contribution when they had no involvement as it relates to the Settlement Program or confirmation, or worse, opposed the Settlement Program and plan confirmation as Pearl did.

7. Even if the Court were to find that Pearl could meet its burden and prove that it made a substantial contribution, which the Debtors do not think it could, the Court must find that the fees requested are reasonable. In an effort to preserve estate resources, the Debtors have



not conducted an analysis of the fees requested and reserve their right to object and conduct discovery with respect thereto.

**I. PEARL HAS NOT ESTABLISHED ITS BURDEN TO DEMONSTRATE A  
SUBSTANTIAL CONTRIBUTION OF OVER \$200,000**

6. Under applicable law, Pearl bears the burden to demonstrate that its participation in Plan negotiations and the Settlement Program amounted to a “substantial contribution” to the Debtors’ estates. Pearl failed to meet this burden.

**A. Pearl Must Carry the High Burden Under Section 503(b)(3)(D)**

7. To demonstrate that it has made a “substantial contribution” under section 503(b)(3)(D), the petitioning creditor must carry the burden of proof by “a preponderance of the evidence.” *In re United States Lines, Inc.*, 103 B.R. 427, 429 (Bankr.S.D.N.Y.1989). The burden is “exceedingly difficult,” *In re Villa Luisa, L.L.C.*, 354 B.R. 345, 348 (Bankr. S.D.N.Y. 2006), because section 503(b)’s substantial contribution provision “must be narrowly construed” to “discourage mushrooming [administrative] expenses.” *In re Granite Partners, L.P.*, 213 B.R. 440, 445 (Bankr.S.D.N.Y.1997). Recovery under the provision is “subject to strict scrutiny by the court,” *In re U.S. Lines, Inc.*, 103 B.R. 427, 429 (Bankr. S.D.N.Y. 1989), *aff’d*, No. 90 CIV. 3823 (MGC), 1991 WL 67464 (S.D.N.Y. Apr. 22, 1991), and it “must be preserved for those *rare* occasions when the creditor’s involvement truly fosters and enhances the administration of the estate.” *In re S & Y Enterprises, LLC*, 480 B.R. 452, 459 (Bankr. E.D.N.Y. 2012) (italics added). Put differently, any such recovery “should be the exception, not the rule.” *Id.* And the “general rule remains that attorneys must look to their own clients for payment.” *In re Dana Corp.*, 390 B.R. 100, 108 (Bankr. S.D.N.Y. 2008).

8. A case previously decided by this Court sheds light on the high threshold that must be satisfied to make a substantial contribution claim. In *In re Bayou Grp., LLC*, this

Court held that, in the absence of a fiduciary who could protect the estate's interest, an unofficial committee of creditors which self-organized to lay the groundwork for a chapter 11 case, including the means for administering the case, had made a "substantial contribution" to the debtor's estate and was entitled to reimbursement of the fees and expenses incurred in connection with its counsel's work for the case. 431 B.R. 549, 555, 563–64, 567 (Bankr. S.D.N.Y. 2010). It is clear from the record and the reasons set forth herein that the Debtors worked amicably with other estate professionals (the UCC) and the Foley Group, who by Pearl's own admission was responsible for negotiating the Settlement Program, and not Pearl.

9. Additionally, this Court noted that in order to qualify as a "substantial contribution," the direct benefit provided by the petitioning creditor "cannot be established merely by the movant's extensive participation in the case." *Id.* at 561. The key is to provide a good or service that "normally would be expected of an estate-compensated professional but was not so performed," which results in the creditors stepping in the shoes of the professionals and playing a "leadership role" in the cases. *Id.* at 562. Creditors who "merely furthered their own or their constituents' interests" cannot rely on section 503(b)(3)(D) and (b)(4) to be rewarded. *Id.*

10. Here, as stated, at all times Pearl was acting in its own interest and for its singular benefit, as demonstrated by its ultimate decision to settle in exchange for the allowance of its claim and waiver of preference claims. To the extent that Pearl or its counsel provided *any* benefit to the estate, which the Debtors dispute, it was de minimis and was merely leverage to settle Pearl's single claim against the Debtors (which itself was de minimis in the context of these cases).

11. Moreover, Pearl's attempt to leverage the Court's ruling to move certain funds from the professional's escrow account to the pool of funds available to administrative

creditors should not be considered a service or an action taken by a professional that would give rise to a claim for substantial contribution. Pearl claims it played a key role in increasing the initial distribution to administrative creditors by \$1 million. Even if true, this was, at most, a de minimis increase (5%) of what was an initial distribution to administrative creditors, and which Pearl, as an opt-in creditor, benefitted from directly. More importantly, the claimed contribution did not add any value to the Debtors' estates or increase at all the ultimate recovery to any class of creditors. If the \$1 million had not been paid out in the initial distribution, it would have been included in the second distribution to the same group of creditors, including Pearl, in light of the Court's ruling. The Court noted it would have made the same consideration either at the confirmation hearing or at a hearing on final fee applications, and it chose the former. *See* TR2 161:11. (Even if the Court could find that the \$1 million was somehow a benefit, Pearl's request for 20% of the purported benefit now for itself should be denied as disproportionate.)

12. Pearl also had nothing to do with and did not negotiate a \$9 million contribution from the professional fee escrow. The Court made this independent determination in its ruling confirming the Plan after Pearl's objection was withdrawn. *See* TR2 161:11-162:12.

13. Finally, the increase of 5% distribution was unrelated to Pearl and was done voluntarily by the Debtors, the UCC and the Foley Group in response to comments from the Court and after Pearl had already settled. At the hearing, counsel for the Debtors explained:

Just one or two other changes I would just like to note, with respect to the consent program. Your Honor, following the hearing last week, and some of the concerns the Court raised with respect to those creditors, administrative expense creditors, who neither opt-in, nor opt-out of the settlement, so that sort of third class we were talking about. So, Your Honor, we've changed the consent program so that those parties now, their aggregate recover, instead of being capped at 75 cents of the allowed amount of their administrative claim, they would be capped at 80 percent of the allowed amount of their administrative expense claim.

*See* TR2 12:20.

14. Pearl never suggested or argued for a 5% increase in distribution for non-opt out administrative expense creditors. Rather, Pearl argued that the Settlement Program was unfair entirely, only furthering its resistance to the Settlement Program and confirmation overall. *See* TR1 243:10. Pearl complained that certain creditors may not receive notice or retain counsel given that they were foreign vendors, but never suggested a modification to the Settlement Program to address this concern; rather, it used this angle to try to defeat approval of the Settlement Program and confirmation in total.

15. For these reasons, Pearl has not carried its burden that they are entitled to reasonable fees in connection with a substantial contribution.

### **Conclusion**

16. The Debtors understand that the UCC and the Administrative Claims Representative will join the Debtors in support of this objection. As a result, and for the reasons set forth herein, the Application should be denied.

Dated: January 14, 2021  
New York, New York

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**Exhibit A**

10/3/2019 Confirmation Hearing Transcript

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK  
Case No. 18-23538-rdd

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In the Matter of:

SEARS HOLDINGS CORPORATION, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court  
300 Quarropas Street, Room 248  
White Plains, New York 10601

October 3, 2019  
10:32 AM

B E F O R E:  
HON. ROBERT D. DRAIN  
U.S. BANKRUPTCY JUDGE

1 18-23538-rdd Sears Holdings Corporation, et al.  
2 Ch 11  
3 10:00 AM  
4  
5 HEARING re Modified Second Amended Joint Chapter 11 Plan of  
6 Sears Holdings Corporation and Its Affiliated Debtors (ECF  
7 #5293)  
8  
9 Limited Objection and Reservation of Rights of Liberty  
10 Mutual Insurance Company (ECF #3989)  
11  
12 Objection to Confirmation of Plan filed by Mark A. Frankel  
13 on behalf of 233 S. Wacker, LLC (ECF #4668)  
14  
15 Objection of Tannor Capital Advisors LLC (ECF #4673)  
16  
17 Limited Objection of Winners Industry Co. (ECF #4678)  
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19 UST's Objection (ECF #4681)  
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21 Objection of Acadia Realty Limited Partnership (ECF #4684)  
22  
23 Objection of Mario Aliano (ECF #4690)  
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25 Objection of Alpine Creations Ltd (ECF #4700)

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2     Objection of Retiree Committee (ECF #4702)

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4     Objection of Carl Ireland, Administrator of the Estate of  
5     James Garbe (ECF #4707)

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7     Objection of Weihai Lianqiao International Coop. Group Co.,  
8     Ltd. (ECF #4708)

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10    Limited Objection of PeopleReady, Inc. (ECF #4709)

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12    Objection of A.O. Smith Corporation's Joinder to Objection  
13    of Alpine Creations Ltd. (ECF #4712)

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15    Objection of Community School District 300 (ECF #4713)

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17    Objection of Santa Rosa Mall (ECF #4714)

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19    Objection of Mien Co. Ltd. (ECF #4716)

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21    Objection of Everlast World's Boxing Headquarters Corp. (ECF  
22    #4717)

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24    Limited Objection of and Reservation of Rights of ESL  
25    Investments Inc. and Transform Holdco LLC (ECF #4718)



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Redacted Declaration of Chelsey Rosenbloom in Support  
Limited Objection and Reservation Rights of ESL Investments,  
Inc. and Transform Holdco LLC (ECF 4719)  
  
Objection of Edgewell Personal Care PR Inc. (ECF #4720)  
  
Objection of Whitebox Asymmetric Partners, LP (ECF #4721)  
  
Objection of Wilmington Trust, National Association, as  
Indenture Trustee (ECF #4724)  
  
Objection of Vehicle Service Group, LLC (ECF #4725)  
  
Amended Objection of Mien Co. Ltd. (ECF #4726)  
  
Objection of Pearl Global Industries, Ltd. (ECF #4730)  
  
Limited Objection of Cyrus Capital Partners, L.P. (ECF  
#4731)  
  
Limited Objection and Reservation of Rights of ESL  
Investments Inc. and Transform Holdco LLC (ECF #4759)  
  
Objection of Team Worldwide Corporation (ECF #4773)

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Joinder of Twentieth Century Fox Home Entertainment LLC (ECF  
#4780)

Supplemental Objection of Wilmington Trust, N.C. (ECF #4785)

Limited Objection of and Reservation of Rights of ESL  
Investments Inc. and Transform Holdco LLC (ECF #4786)

Joinder of Mien Co. Ltd. to Limited Objection of and  
Reservation of Rights of ESL Investments Inc. and Transform  
Holdco LLC (ECF #4801)

Joinder of Schumacher Electric Corporation (ECF 4861)

Supplemental Objection of Community Unit School District 300  
to Confirmation (ECF #5005)

Joinder of Aspen Marketing Services, Inc. to Objection of  
Alpine Creations Ltd. (ECF #5041)

Joinder of Groupby USA, Inc. (ECF #5048)

Santa Rosa Mall, LLC's Supplemental Objection (ECF #5088)

1 Supplemental Response of ESL (ECF #5192)

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3 Supplemental Objection of Mien Co. Ltd. (ECF #5266)

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5 Joinder of EPI Printers, Inc. (ECF #5271)

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7 Joinder of BST International Ltd to Supplemental Objection  
8 Mein Co. Ltd (ECF #5273)

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10 Joinder of EPI Partners, Inc. (ECF #5274)

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12 Objection of Mien Co. Ltd., et al. [ECF No. 5277]

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14 Joinder by Edgewell Personal Care Puerto Rico Inc. (ECF  
15 #5283)

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17 Joinder by Eric Jay Ltd (ECF #5285)

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19 Joinder by A.O. Smith Corporation (ECF #5286)

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21 Joinder by Weihai Lianqiao International Coop. Group Co.,  
22 Ltd (ECF 5287)

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24 Joinder of Peral Global Industries, Ltd (ECF 5289)

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1 Joinder of BH North American Corporation (ECF #5290)

2 10:59 AM

3 18-23538-rdd Sears Holdings Corporation Ch. 11

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5 HEARING re Motion of Debtors for Modification of Retiree

6 Benefits [ECF No. 4635]

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1 P R O C E E D I N G S

2 THE COURT: Okay. Good morning. In re Sears  
3 Holdings Corporation. I'm sorry I kept you waiting. I had  
4 some last minute filings that I wanted to go through and  
5 think about.

6 MS. MARCUS: Good morning, Your Honor. Jacqueline  
7 Marcus of Weil Gotshal & Manges, LLP on behalf of Sears  
8 Holdings Corporation and its affiliated debtors.

9 THE COURT: Good morning.

10 MS. MARCUS: Before we get to the main event, Your  
11 Honor, the confirmation hearing, as we advised chambers last  
12 night, we'd like to start with what's number 2 on the agenda  
13 which is the motion of the debtors for modification of  
14 retiree benefits --

15 THE COURT: Right.

16 MS. MARCUS: -- ECF number 4635 which is now  
17 uncontested.

18 You have a packed courtroom, Your Honor, so I'll  
19 be brief.

20 The debtors filed their 1114 motion and the  
21 supporting declaration of William Murphy on July 29th.  
22 Since that time, the debtors, with input from the creditors'  
23 committee, have gone back and forth with the retiree  
24 committee and continue to modify the proposal. And within  
25 the past 24 hours, I'm happy to report that the debtors, the

1 retiree committee and the creditors' committee have reached  
2 an agreement on a revised proposal.

3 I have, Your Honor, a revised version of the order  
4 together with a blackline and the exhibit to the blackline  
5 reflects the changes to the proposal. If I may approach?

6 THE COURT: Okay.

7 MS. MARCUS: The salient terms of the proposal are  
8 as follows, and I will be brief:

9 The effective date of the termination of the  
10 retiree plan is March 15th, 2019. On the effective date of  
11 the Chapter 11 plan, the debtors will establish an  
12 administrative reserve in the amount of \$3 million for the  
13 benefit of retirees who are members of the class covered by  
14 the 2001 stipulation of settlement whose benefits were not  
15 paid by Securian.

16 The estate of each member of the class that died  
17 between March 15th and the date of entry of the order, we  
18 call them for purposes of the proposal "The recently  
19 deceased members" -- who filed a proof of claim will have an  
20 allowed administrative expense claim in the amount of his or  
21 her benefits under the retiree plan that can share in that  
22 reserve fund. If its filed and allowed claims exceed \$3  
23 million, the claimant will share pro rata and any remaining  
24 claim for benefits will be a general unsecured claim. And  
25 conversely, if there are remaining funds after the payment

1 of all the filed and allowed claims then those funds would  
2 be transferred to the liquidating trust and be available for  
3 payment of general unsecured claims.

4 The debtors and the creditors' committee will have  
5 the right to dispute the filed claims but they have waived  
6 the argument that the benefits have not vested. And the  
7 proposed administrative claims will not be part of the  
8 administrative claim settlement that the debtors have  
9 announced.

10 Each member of the class who is not what we've  
11 called a recently deceased member and who files a proof of  
12 claim by a date to be agreed to will have a general  
13 unsecured claim in the Sears Roebuck case in an amount equal  
14 to the lesser of his or her benefits under the plan and  
15 \$10,500. We believe that setting the cap at that level will  
16 mean that all but about 650 of the retirees would have a  
17 claim in the full amount of their benefits.

18 Finally, Your Honor, even though they're not  
19 technically members of the class covered by the stipulation,  
20 the proposal does cover what we've described previously as  
21 the grandfathered disableds as well as the retirees whose  
22 benefits were less than \$5,000. And they, if they file  
23 claims, will have general unsecured claims subject to the  
24 same cap of 10,500 at an aggregate cap of 16.9 million.

25 The last element of the proposal is that the

1 retiree committee will withdraw its confirmation objection  
2 and support confirmation of the Chapter 11 plan.

3 The debtors believe, Your Honor, that with the  
4 consent of the retiree committee, which is the authorized  
5 representative of the retirees, we've satisfied the  
6 requirements for modification of benefits as provided in  
7 Section 1114(e)(1)(B). Nevertheless, we also think we meet  
8 the requirements for modification under Section 1114(f) by  
9 making a proposal that provides for modification of the plan  
10 that is necessary to permit confirmation of the Chapter 11  
11 plan and ensures that all creditors, the debtors and all  
12 affected parties are treated fairly and equitably.

13 Accordingly, Your Honor, the debtors request that  
14 the Court grant the motion and enter the revised form of the  
15 order which includes the proposal.

16 THE COURT: Okay. There's a lot of people. There  
17 you are.

18 The retiree committee is on board with this  
19 resolution, I'm assuming, as well as the DOL?

20 MR. LAWLOR: Yes, Your Honor. James Lawlor for  
21 the retirees committee.

22 Yes. We support this. It was a collaborative  
23 effort and it was longer than we anticipated but we did the  
24 best we could and we appreciate the debtors' cooperation.

25 THE COURT: Okay. And this reflects the due

1 diligence that the parties --

2 MR. LAWLOR: Yes, Your Honor.

3 THE COURT: -- conducted as far as actuarial  
4 information and --

5 MR. LAWLOR: Yes, Your Honor.

6 THE COURT: -- other due diligence?

7 MR. LAWLOR: That was -- the biggest delay was we  
8 spent a significant amount of time working with the debtors  
9 to try to get as much information as we could and we  
10 extrapolated as best we could and we came up with this  
11 proposal.

12 THE COURT: Okay. And I'm assuming nothing turned  
13 up to suggest that other parties, unlike the primary  
14 beneficiaries to this proposal, had protection from  
15 termination at will?

16 MR. LAWLOR: Right. Your Honor, the only  
17 information we were able to find was the stipulation of  
18 settlement. There was no other indication of vested  
19 benefits as far as we know.

20 THE COURT: Okay. Very well. Thank you.

21 MR. LAWLOR: Thank you.

22 MR. GERSON: Good morning, Your Honor.

23 THE COURT: Good morning.

24 MR. GERSON: Leonard Gerson, Department of Labor.

25 Glad the settlement has been reached. My one

1 concern is that these retirees, the beneficiaries, are not  
2 your typical administrative claimants. They haven't had  
3 recent contact, most likely, with Sears. Who knows where  
4 their insurance policy might be? It's going to be not an  
5 easy matter resolving the individual claims. So I would  
6 hope that some sort of provision get made, particularly  
7 possibly with the office of the liquidating trust, to make  
8 sure that there's somebody specifically identified to deal  
9 with this problem because they're not typical administrative  
10 claimants.

11 THE COURT: Okay.

12 MR. GERSON: And I don't know whether that can be  
13 memorialized in the order or --

14 THE COURT: Do you mean that they would have like  
15 one point of contact, in essence --

16 MR. GERSON: Yes. And to be recog --

17 THE COURT: -- among the staff for the liquidating  
18 trust?

19 MR. GERSON: Yes.

20 THE COURT: Just like, I'm assuming, at this  
21 point, they have one contact or one set of people that they  
22 contact if they have a question.

23 MR. GERSON: Yes.

24 THE COURT: Okay. All right.

25 MR. GERSON: Thank you.

1 MS. MARCUS: Your Honor, we haven't quite settled  
2 on the form of the notice but we're going to work with the  
3 retiree committee and the creditors' committee in terms of  
4 the notice --

5 THE COURT: Right.

6 MS. MARCUS: -- what the appropriate date will be.  
7 And we can include a person to be designated as the point of  
8 contact.

9 THE COURT: Okay. That seems to be appropriate as  
10 opposed to building it into an order. The notice is  
11 important to lay this out. And it's an obvious aspect of  
12 that notice that they have someone that they can call or  
13 e-mail or write to if they have a question about what they  
14 need to do to get the benefits under the settlement; if  
15 there's an objection to their claim, how to deal with that,  
16 et cetera.

17 MS. MARCUS: We'll make sure that's in there, Your  
18 Honor.

19 THE COURT: Okay. All right. Does anyone have  
20 anything more to say on this matter?

21 All right. I had prepared for this matter as if  
22 it was going to be litigated and I don't mind that it was  
23 settled, late as it was. Looking at the requirements under  
24 Section 1114(f), it's clear to me that Congress contemplated  
25 such -- in fact, mandated such negotiations. And they often

1 result in last minute agreements.

2 It appears to be here that the retirees were well  
3 represented as were the debtors and that these negotiations  
4 were at arm's length, didn't unduly favor any particular  
5 group of retirees given the underlying legal rights of the  
6 respective retirees, and that the settlement is a fair  
7 resolution of the dispute that was going to be tried by me  
8 today, which I am -- on which I was pretty well focused.  
9 And this appears to me to be a reasonable settlement in  
10 light of all the issues.

11 MS. MARCUS: Thank you, Your Honor.

12 THE COURT: Okay.

13 MR. LAWLOR: Thank you, Your Honor.

14 THE COURT: Thanks.

15 MR. SCHROCK: Good morning, Your Honor. Ray  
16 Schrock, Weil Gotshal, for the debtors.

17 The next matter on the agenda is the debtors'  
18 confirmation hearing, their second amended plan.

19 Your Honor, in terms of how we proceed, I'd like  
20 to propose that I walk through what objections have been  
21 resolved so that we can deal with those. And then we would  
22 propose to move straight into the evidence.

23 Now I know the U.S. trustee did file a pleading  
24 within the last day that said that they thought the time was  
25 short between filing the administrative consent program



1 materials and moving forward with confirmation. Your Honor,  
2 I think if you want to address that upfront, I'm happy to do  
3 so. But otherwise, I'd like to move forward and get on with  
4 the hearing.

5 THE COURT: Okay. I think it's worth addressing  
6 preliminarily --

7 MR. SCHROCK: Okay.

8 THE COURT: -- and then seeing where we are at  
9 that point.

10 MR. SCHROCK: Okay. Your Honor, in terms of --  
11 and I'll ask the other parties that are moving in support of  
12 the plan also to rise here.

13 In terms of where we are, these issues have been  
14 teed up, frankly, for months. We have the support of the  
15 official unsecured creditors' committee, the PBGC. Of  
16 course, the estates are moving forward. We've now struck a  
17 deal on a consent program with a core group and the largest  
18 group we could frankly find of administrative claimants.  
19 And now we have the support of the official committee of  
20 retirees.

21 The administrative consent program is  
22 fundamentally designed so that parties, after receiving  
23 notice, can decide whether or not they want to opt in to the  
24 settlement and that they're going to have 17 days after  
25 entry of the confirmation order for that to happen. And

1 they can decide 33 days after entry of the confirmation  
2 order if they'd like to opt out.

3 And, really, fundamentally, everything that we're  
4 doing here from the participation of the professionals  
5 contributing funds from the carve-out, which is voluntary,  
6 putting money aside and kind of tiering out these things,  
7 these are all implementation issues associated with a plan.

8 Now one could argue that the issue of binding  
9 someone with consent associated with the failure to opt out,  
10 that that issue -- that certainly, that issue is before the  
11 Court today and it's based upon materials that we filed just  
12 a couple of days ago. Now I believe, Your Honor, that given  
13 where we are and given the need to move expeditiously with  
14 confirmation, we would submit that that issue should be teed  
15 up for argument today. However, if Your Honor had  
16 reservations about that particular issue on the binding  
17 consent, my suggestion would be let's get all the evidence  
18 in today. Let's deal with every issue that we can. And if  
19 we need to put off a few days for that last issue on the  
20 consent, we could certainly do that. But, Your Honor, we're  
21 prepared -- you know, all of these claimants -- and, listen,  
22 I feel like this is a bit like -- you know, we're trying to  
23 find a way to end these cases and it's not easy. We're  
24 striking as many deals as we can. The idea of going to some  
25 sort of further mediation and continuing to allow -- you

1 know, every day that goes by, there's more pleadings that  
2 are filed. And we have to have a stopping mechanism. The  
3 only way that's going to happen is through entry of the  
4 confirmation order.

5 And it is -- listen, it's very tough sledding for  
6 the debtors. And getting this hearing through, getting the  
7 relief in the order, it's a value maximizing proposition.  
8 We'd like the opportunity to put on that case. And it's  
9 basically -- it's a winddown mechanism to distribute the  
10 proceeds of the estate. We are very ready and I think  
11 everybody who says, listen, this is a surprise or something,  
12 we have been trying to keep people informed. We've relied  
13 on the administrative -- the ad hoc administrative claimants  
14 to keep some of the other admins informed. But it's a --  
15 listen, we think it's a reasonable resolution. And the fact  
16 that you have consent -- the failure to opt out being deemed  
17 consent is completely consistent with applicable law in  
18 other circumstances.

19 THE COURT: Okay. Well, I think the debtors have  
20 been clear that while they are proposing this resolution  
21 mechanism as additional support for confirmation of the  
22 plan, they are prepared to show that the plan satisfies  
23 1129(a) and, to the extent relevant, (b) --

24 MR. SCHROCK: Correct.

25 THE COURT: -- even without it. That's right,

1 right?

2 MR. SCHROCK: That is correct, Your Honor.

3 THE COURT: Okay. Okay.

4 MR. SCHROCK: Okay.

5 MR. SCHWARTZBERG: Your Honor, Paul Schwartzberg  
6 for the U.S. trustee's office.

7 That was -- the point Your Honor just made was one  
8 of the points I was going to bring up. This isn't necessary  
9 for confirmation according to the debtors. And we are  
10 concerned about the notice to the admin creditors. Not only  
11 is the consent issue upfront right now, Your Honor, as  
12 opposed to down the line, but also, there is an impact on  
13 the admin creditors that opt out or don't opt in as they're  
14 now put behind other creditors. And that may impact their  
15 ability to get (indiscernible). We believe that notice  
16 should be provided to those creditors to allow them to come  
17 in if they want. And --

18 THE COURT: Notice of what, though?

19 MR. SCHWARTZBERG: Notice of this new procedure  
20 that was filed after close of business on October 1st.

21 THE COURT: Well, there are two different types of  
22 notice. The debtor has given notice that -- you know, back  
23 in July that it's seeking to confirm the plan. And clearly,  
24 that was sufficient to inform administrative expense  
25 creditors that they have rights, as all creditors do, to

1 object to the plan. And there have been a number of  
2 objections, under 1129(a), from the administrative expense  
3 creditors.

4 So I guess, as far as notice is concerned, the  
5 debtors are proposing notice of this procedure. And there  
6 may be issues with respect to what that notice says, how  
7 informative it is. But as far as -- that's not the notice  
8 you're talking about, right? You're talking about the  
9 notice of approving this procedure today.

10 MR. SCHWARTZBERG: Correct, Your Honor. People --  
11 or administrative creditors might not approve of the  
12 procedure. They might not approve of the deemed consent.  
13 They might not approve of the --

14 THE COURT: No. But the -- let's leave that  
15 aside. I think that the debtors have already said that's  
16 something that can be discussed later in the hearing.

17 But I guess, the -- as I read it, the proposal,  
18 the proposed agreement, with the settling administrative  
19 expense creditors is not a simple we will take 25 percent  
20 less. It says that with respect to the 25 percent -- I'm  
21 sorry -- with respect to the 75 percent that we are  
22 asserting, we get certain first money out. And I guess,  
23 you're suggesting that that affects the rights of the other  
24 creditors?

25 MR. SCHWARTZBERG: Puts them behind both the opt-

1 in creditors and those that --

2 THE COURT: Well, but again, if they can opt in  
3 also, affirmatively opt in, then they're not behind them,  
4 right?

5 MR. SCHWARTZBERG: But --

6 THE COURT: So, to me, they have that right, too.  
7 It's not like the people who have settled are looking to get  
8 an exclusive right. Anyone can opt in. So, to me, that's  
9 not a disparate treatment issue. You know? It's one thing  
10 to make sure the notice is right so that people know enough  
11 to make an informed decision or a reasonably informed  
12 decision. But if they have the same right to opt in, I'm  
13 not sure there's an issue there.

14 MR. SCHWARTZBERG: All right. Thank you, Your  
15 Honor.

16 THE COURT: I mean, if they didn't, I would  
17 certainly understand your point.

18 And that leaves the issue of the third option, if  
19 you will, which is either you could opt out, you could opt  
20 in, but there's something in between, which is you don't do  
21 anything but you get certain rights but you also get a  
22 certain -- you don't get exactly the same treatment. But  
23 Mr. Schrock said we can discuss that as we go along. And I  
24 think that's part of the notice and part of the -- you know,  
25 the mechanic as opposed to the underlying legal right to get

1 additional notice to focus on whether this changes the plan.  
2 See, fundamentally, I don't think this changes the plan. I  
3 guess that's what I'm (indiscernible).

4 MR. SCHWARTZBERG: I guess, also, Your Honor, just  
5 to point out, it's not necessary for today. We don't know  
6 what arguments admin creditors are going to make. So to  
7 give them less than 48 hours notice --

8 THE COURT: Admin creditors will make any argument  
9 they want to. I mean, I've had no -- I have no doubt about  
10 that having read the objections. So that's not really the  
11 point. I think the point is, objectively, rationally, other  
12 than issues about the adequacy of the notice, a deal with 18  
13 percent of them that lets every other 82 percent of them  
14 have the same deal, to me, is -- that doesn't change  
15 anything. That's just making it clear that some people have  
16 made a deal that is open to everybody. So I just don't --  
17 what are they going to say that actually is worth listening  
18 to in response to that?

19 MR. SCHWARTZBERG: Your Honor, not being in their  
20 shoes, I don't know what their argument's going to be.

21 THE COURT: Well, I know, but it just doesn't  
22 compute to me. So I'm going to go ahead with the hearing.  
23 Again, with the caveat that I think we do need to focus on  
24 the notice that's given to this group and the mechanism for  
25 it. And also, you know, the third category, if you will,

1 the abstain category.

2 MR. SCHWARTZBERG: All right. Thank you, Your  
3 Honor.

4 THE COURT: Okay.

5 MR. WANDER: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MR. WANDER: David Wander of Davidoff Hutcher &  
8 Citron. I represent three creditors today: Pearl Global  
9 Industries, Eric Jay and (indiscernible) Company.

10 Pearl Global is a foreign vendor and it's affected  
11 by this administrative claim settlement. Eric Jay is a  
12 domestic vendor.

13 I filed two declarations, Your Honor, in  
14 connection with the negotiations that have been going on  
15 recently. I attended a chambers call with Your Honor the  
16 other week. And I just want to correct some things on the  
17 record or make them clear and in response to some comments  
18 the debtors' counsel made.

19 First of all, the largest group in number of  
20 administrative creditors were not included in the  
21 negotiations. You have two groups. One group is comprised  
22 of a bunch of claims traders. They purchased claims in the  
23 case presumably at some kind of a discount. They're larger  
24 in number -- in the amount of the claims they may represent,  
25 30, \$40 million in claims, or to about half a dozen of them.



1 The other vendor group has in excess of 50 vendors and, in  
2 round numbers, the claims are approximately 15, \$20 million.  
3 A lot of them are the foreign vendors.

4 Other than an initial meeting, a settlement  
5 meeting, that both ad hoc groups attended and we were given  
6 a confidential term sheet, there's been no further  
7 negotiations with the largest group of ad hoc vendors. And  
8 the proposed confidential settlement agreement shortly  
9 thereafter was filed as an exhibit to the plan.

10 So, first, to be clear, most of the administrative  
11 creditors have not been parties to the negotiations. And  
12 the settlement adversely affects them. And honestly, Judge  
13 --

14 THE COURT: How?

15 MR. WANDER: I'll tell you how.

16 THE COURT: 'Cause your declarations didn't say  
17 that.

18 MR. WANDER: Well, Your Honor, first --

19 THE COURT: Didn't say the reason. It just made  
20 the statement.

21 MR. WANDER: First of all, Your Honor, we received  
22 the document that, close to midnight --

23 THE COURT: No. How does it adversely affect  
24 them?

25 MR. WANDER: Sure. I'll address that, Your Honor.

1 THE COURT: Okay.

2 MR. WANDER: First of all, it's -- two ways. The  
3 first way the U.S. trustee's office noted, which is an  
4 automatic opt-in wherein administrative creditor with an  
5 allowed claim is entitled to get 100 cents under the  
6 Bankruptcy Code, under the automatic opt-in, they may get 75  
7 cents of an allowed claim. So that's a fatal flaw in the  
8 mechanism right there.

9 The second flaw and the second prejudice is it  
10 takes a certain amount of available cash that should be  
11 available for all the administrative creditors and it locks  
12 those funds up for the settling creditors. And for that  
13 reason, it prejudices the group. So --

14 THE COURT: But you still have -- the debtors are  
15 still going to be making their showing today and you've  
16 already objected, twice in fact, that they can't make the  
17 showing that they'll satisfy 1129(a)(9). So --

18 MR. WANDER: But we're saying, Judge, even under  
19 any construct of confirmation with this construct of  
20 settlement, it's taking cash and it's saying if you settle,  
21 you get it on December 1. If you don't settle, the cash may  
22 not be there -- the cash is not there for you. And it could  
23 be the only cash that, in the end, is available for the  
24 creditors.

25 THE COURT: But again, you have your objection

1 where you can try to convince me that -- and the debtors  
2 have the burden of proof so they have to convince in light  
3 of your objection -- that on the effective date, the cash  
4 won't be there to pay those who don't opt in.

5 MR. WANDER: Well, Your Honor, so the effective  
6 date, we don't know when that's --

7 THE COURT: Well, that's the confirmation issue.  
8 But this settlement doesn't affect that.

9 MR. WANDER: Yes. What it does is, it takes cash  
10 that's available before the plan goes effective --

11 THE COURT: Right.

12 MR. WANDER: -- and it gives that cash to the  
13 settling creditors.

14 THE COURT: Okay.

15 MR. WANDER: So if you don't settle --

16 THE COURT: So it varies that the -- it's proposed  
17 as a means to get people paid before the effective date.  
18 And if people want to get paid before the effective date in  
19 a reduced amount, they can opt in. If they want to wait,  
20 assuming that I confirm the plan, which we're on for today  
21 to decide, they could wait to get the full amount. What is  
22 that -- I mean, I --

23 MR. WANDER: Let me explain --

24 THE COURT: To me, that's just not --

25 MR. WANDER: Here -- let me explain, Your Honor.

1 So -- and I'll focus on Pearl Global. The debtor recently  
2 filed their tenth omnibus objection to the claims and that  
3 included an objection to Pearl Global's -- one of their  
4 503(b)(9) claims.

5 THE COURT: Okay.

6 MR. WANDER: But they did not object in full. The  
7 claim, in round numbers, Your Honor, is \$450,000. After the  
8 objection, round numbers, they say my client has an allowed  
9 claim of \$350,000.

10 THE COURT: Okay.

11 MR. WANDER: So my client should be entitled to  
12 get paid its undisputed allowed administrative claim.  
13 There's funds to pay it. The debtor is going to --

14 THE COURT: No, no, no. It is entitled to get  
15 paid it on the effective date.

16 MR. WANDER: So creditors --

17 THE COURT: If it wants to take at a discount and  
18 get paid before the effective date, some portion, it can  
19 negotiate with the debtor to do that.

20 MR. WANDER: But an allowed administrative  
21 claimant is not supposed to have to wait until an effective  
22 date --

23 THE COURT: Absolutely wrong. The case law is  
24 entirely clear that while, in the ordinary course, where  
25 there are no issues of administrative insolvency, a debtor

1 should be paying its administrative expenses as they come  
2 due. In fact, if there is an issue of administrative  
3 insolvency, or the claims are still being worked out, it  
4 needs to wait. And that's why I'm assuming this group is  
5 compromising because they don't want to wait. But that's  
6 the law and you're not going to convince me otherwise.  
7 That's the Second Circuit on down.

8 MR. WANDER: Right. So, as Your Honor said, that  
9 the debtor can and should pay --

10 THE COURT: No, I didn't say that.

11 MR. WANDER: Let me finish, Your Honor.

12 THE COURT: I said that's -- no.

13 MR. WANDER: In the ordinary course --

14 THE COURT: Look, I'm not going to reargue that  
15 point with you. You're just wrong on that point.

16 MR. WANDER: In the ordinary course --

17 THE COURT: No one is entitled to be paid 100  
18 cents on the dollar today. Period.

19 MR. WANDER: I didn't say today.

20 THE COURT: Well, you just did.

21 MR. WANDER: No. What I'm --

22 THE COURT: You said because they have an allowed  
23 claim of \$350,000, they're entitled to be paid today and pay  
24 someone else 75 percent, or some portion of that, capped at  
25 75 percent today, violates your client's rights. And the

1 answer to that is no, it does not --

2 MR. WANDER: What I'm saying is --

3 THE COURT: -- particularly when they have the  
4 option to take the same treatment.

5 MR. WANDER: What I'm saying is, allowed --  
6 undisputed administrative claims -- and this includes just  
7 simple post-petition claims from October, November, December  
8 of 2018 -- were entitled and should have been paid in the  
9 ordinary course of business. That's the point that I was  
10 picking up from what Your Honor said.

11 THE COURT: Look, if that's what you're telling  
12 your client, they're being misinformed. They're not  
13 entitled to be paid in full. They took that risk when they  
14 extended the trade credit. It's that simple. So don't tell  
15 them otherwise. They're entitled to be paid in full on the  
16 effective date.

17 MR. WANDER: Right. So if the funds that are  
18 available to pay allowed administrative claims if the  
19 effective date is pushed out for a year or two --

20 THE COURT: That's the confirmation argument you  
21 made in two objections to the plan.

22 MR. WANDER: And --

23 THE COURT: I will get to that. This is a  
24 different issue we're discussing today --

25 MR. WANDER: Okay.

1 THE COURT: -- right now.

2 MR. WANDER: Your Honor, as I said, I think that  
3 it prejudices two things. One, we haven't had enough time  
4 to even read the papers in support of it. The opt-in  
5 provision, we submit, is patently improper. And as I'm  
6 saying, Your Honor, they're taking available cash and  
7 they're saying if you settle under their construct, the cash  
8 will be there. If you have an allowed claim and it's  
9 December 2nd, the cash is gone. And that's just not fair,  
10 Your Honor.

11 THE COURT: Okay. All right. Well, I don't  
12 really see how adjourning this hearing will change the  
13 statements you just made.

14 MR. WANDER: Well, one further thing.

15 THE COURT: No. How would adjourning the hearing  
16 add any new light or color to those statements?

17 MR. WANDER: I'll tell you, Your Honor. Counsel  
18 for the debtor made a comment about further mediation would  
19 not make any sense. I wrote that down. I just want Your  
20 Honor to be aware that yesterday, I was contacted by the  
21 attorneys for ESL and Transform who indicated that they were  
22 ready, willing and able to attend mediation of --

23 THE COURT: Mr. Wander, please. These are the  
24 people that are being sued for over \$2 billion. I think you  
25 just have to take the offer to put things off with a grain

1 of salt.

2 Now go back to my question. What additional facts  
3 will be elucidated other than the hope that -- or the  
4 leverage that you would obtain as a result of an  
5 adjournment, including with respect to claim allowance as  
6 well as settlement, to enable me to evaluate this  
7 settlement? We have the information, which you've had for  
8 months now, in the declarations. You say they've had to be  
9 updated because of various rulings by the Court and the like  
10 regarding the company's asset and liability position.  
11 That's not going to change except the assets will be  
12 smaller, right? There's no additional information you need  
13 to evaluate the objection to the settlement which is that  
14 those who opt in to the settlement will be getting  
15 potentially, and maybe more than potentially, a greater  
16 recovery on their administrative expense than those who opt  
17 out.

18 MR. WANDER: Well, actually, Your Honor, the  
19 information that we get has been changing every --

20 THE COURT: All right. But it's not going to  
21 change any more than what it is today except for the fact  
22 that there may be one more ruling by me for more expenses  
23 incurred in terms of an all-hands mediation. It's not going  
24 to change in any other way. And I can factor that into  
25 account.



1 MR. WANDER: Well, Your Honor, as I said, if the  
2 effective date is going to be pushed out and the only money  
3 that very likely may be available is the money that's going  
4 to go on December 1, all of the other administrative  
5 creditors who are not even included in this are going to be  
6 prejudiced because the funds are going to be gone --

7 THE COURT: No. That's the -- no. I'm sorry.  
8 You're just repeating yourself on this. That's the case  
9 that you can make in objecting to the debtors' plan. You've  
10 had all that information to the extent you had it. And they  
11 have the burden of proof on showing that they won't be  
12 prejudiced. So let's get on with it.

13 MR. WANDER: Okay, Your Honor. Thank you.

14 MR. SCHROCK: Thanks, Your Honor. Again, Ray  
15 Schrock, Weil Gotshal, for the debtors.

16 Your Honor, can I go through just quickly which  
17 objections have been resolved?

18 THE COURT: Yes. And I know we have a crowded  
19 courtroom. I also have a number of people on the phone.

20 MR. SCHROCK: Yes.

21 THE COURT: And if you are representing an  
22 objectant and Mr. Schrock says your objection's been  
23 resolved and you disagree with that, you need to speak up.  
24 And I wouldn't mind if you also state, yes, we agree with  
25 him but I'm not going to require that. I'm assuming that

1 there may be some people whose objections were resolved who  
2 decided that they don't want to spend the money on a lawyer  
3 to hear it all over again --

4 MR. SCHROCK: All right, Your Honor. Just so --

5 THE COURT: -- and, therefore, won't be on the  
6 phone or in the courtroom to tell me that the objection's  
7 been resolved.

8 MR. SCHROCK: I apologize, Your Honor. I was just  
9 going to say that when I go through these resolved  
10 objections, I'll note the ECF number and I'll also note the  
11 reference on the agenda --

12 THE COURT: Okay.

13 MR. SCHROCK: -- so the parties can follow along.

14 So the first one that's been noted as resolved is  
15 the Liberty Mutual Insurance Company. That's at ECF number  
16 3989. And that's at 1(A) in the agenda. That's resolved.

17 THE COURT: Okay. And this is -- it's resolved by  
18 the plan just basically saying that a surety program --

19 MR. SCHROCK: Correct.

20 THE COURT: -- runs through until it runs out by  
21 its own terms?

22 MR. SCHROCK: Yes.

23 THE COURT: Okay.

24 MR. SCHROCK: The next one's 223 South Wacker,  
25 LLC. That's at ECF number 4668. That's at 1(B). We've

1 included language in the confirmation order to resolve the  
2 objection.

3 THE COURT: Right. And, in essence, here, the  
4 conformation order states that the plan injunction doesn't  
5 enjoin 223 South Wacker to the extent it has the rights  
6 under its stipulation from proceeding with the litigation --

7 MR. SCHROCK: Correct.

8 THE COURT: -- involving the sculpture.

9 MR. SCHROCK: And the next one that's been  
10 resolved, Your Honor, is LBG Hilltop, LLC.

11 THE COURT: Can I stop you there for a second?

12 MR. SCHROCK: Sure.

13 THE COURT: 223 South Wacker also, arguably,  
14 objected that the plan wasn't feasible to the extent that it  
15 was counting on a \$4 million projected recovery. I'm not  
16 sure that really was part of the objection but is anyone  
17 from the objectant here to prosecute that or on the phone?

18 MR. SCHROCK: No. We understood it was all --

19 THE COURT: I think -- I mean, their main issue  
20 was they just wanted to continue with litigation --

21 MR. SCHROCK: Okay.

22 THE COURT: -- to the extent they're able to.

23 MR. SCHROCK: And again, Your Honor, LBG Hilltop,  
24 LLC, which is at ECF number 4680, has been resolved. We  
25 have confirmed here with Transform that the landlord for the

1 lease was assigned to Transform subject to the Hilltop REA  
2 and other applicable restrictive covenants. But we also  
3 added in paragraph 37 to the confirmation order that  
4 "Nothing in the Plan alters the terms and provisions of the  
5 Construction, Operation and Reciprocal Easement Agreement".

6 Next one, Your Honor, it's on the chart, it's  
7 number 7. It's Acadia Realty Limited Partnership. It's at  
8 ECF number 4684, on the agenda as 1(F). We have resolved  
9 this -- they had a few objections. We've resolved these by  
10 adding to paragraph 34 of the order that notwithstanding  
11 anything in the documents -- anything in the plan or the  
12 other related documents affect the rights "to any executory  
13 contract, whether current or previously executory, or a  
14 lease of non-residential real property to assert any right  
15 of setoff or recoupment".

16 THE COURT: Right. And this is an objection that  
17 was raised by a number of parties --

18 MR. SCHROCK: Yes.

19 THE COURT: -- that you could read the plan  
20 injunction and maybe other provisions as precluding setoff  
21 or recoupment. And the debtors were making it clear that  
22 that is not the case.

23 MR. SCHROCK: Yes.

24 THE COURT: I think you also have agreed to treat  
25 all of the landlords, as defined in that objection, as

1 having opted out of the release?

2 MR. SCHROCK: That's correct, Your Honor.

3 THE COURT: Okay.

4 MR. SCHROCK: Yeah. We treated them all as opting  
5 out.

6 THE COURT: Right.

7 MS. HEILMAN: Your Honor, if I may --

8 THE COURT: Yes. Go ahead.

9 MS. HEILMAN: -- on the phone? Your Honor, Leslie  
10 Heilman on behalf of Ballard Spahr on behalf of the Acadia  
11 Realty Limited Partnership Group landlord. The statements  
12 on the record, I've confirmed that we are resolved --

13 THE COURT: Okay.

14 MS. HEILMAN: -- with the changes.

15 THE COURT: Thank you.

16 MS. HEILMAN: Thank you.

17 MR. SCHROCK: Okay. Next, we go to number 11 on  
18 the chart which was the official committee of retirees --

19 THE COURT: Right.

20 MR. SCHROCK: -- which we've just addressed. It's  
21 1(I). And as set forth on the record by Ms. Marcus, that  
22 has been resolved.

23 THE COURT: Okay.

24 MR. SCHROCK: Next, we're going to number 15 on  
25 the chart which is McDonald's Corporation, which is at 1(WW)

1 in the agenda. This is regarding, you know, an outstanding  
2 cure issue. And a stipulation and proposed order resolving  
3 this objection was filed on the docket on October 3rd at ECF  
4 number --

5 THE COURT: Well, not October 3rd. Was it,  
6 really?

7 MR. SCHROCK: It was at 5303.

8 THE COURT: I mean, that's today. Was it just  
9 filed?

10 MR. SCHROCK: Yesterday. Oh, sorry --

11 THE COURT: Oh, okay.

12 MR. SCHROCK: -- the 2nd.

13 THE COURT: All right.

14 MR. SCHROCK: October 2nd.

15 THE COURT: So that's resolved.

16 MR. SCHROCK: That's resolved.

17 THE COURT: Okay. Very well. I mean, this was  
18 just a cure reservation anyway, I think. So --

19 MR. SCHROCK: Right. Yeah. I don't think it --

20 THE COURT: Okay.

21 MR. SCHROCK: -- was going to be fatal.

22 Your Honor, I believe that number 16 on the  
23 objection chart, Community Unit School District 300, which  
24 is at 1(M), has been resolved.

25 THE COURT: Okay.

1 MR. SCHROCK: My understanding is that they'll be  
2 withdrawing all objections to the plan. And there's an  
3 agreement where, essentially, five million of the EDA  
4 proceeds will be going to the estate, two million will be  
5 returned. They're going to withdraw all proofs of claims --

6 THE COURT: Returned to the school district or --

7 MR. SCHROCK: Yes.

8 MR. FRIEDMANN: Your Honor, Jared Friedmann, from  
9 Weil Gotshal.

10 It's a more complicated settlement agreement than  
11 we had hoped for. And while we finalized it literally just  
12 this morning on the way in -- and a copy, I think, was  
13 provided, too. But the idea is that there was a 2017 EDA  
14 funds that were \$7.1 million that had not yet been  
15 distributed.

16 THE COURT: Right.

17 MR. FRIEDMANN: We reached an agreement with the  
18 school district where the Village will disburse \$5.1 million  
19 to the debtors. The other two million dollars will go to  
20 the school district.

21 THE COURT: Okay.

22 MR. FRIEDMANN: It also resolves a number of other  
23 issues allowing them to withdraw their plan objection with  
24 certain carve-outs. They're releasing also claims relating  
25 to prior years of distributions as it relates to the

1 debtors. They're maintaining claims they may have against  
2 the Village and other third parties.

3 THE COURT: Okay.

4 MR. FRIEDMANN: But it allows --

5 THE COURT: In any event, there's a --

6 MR. FRIEDMANN: There's a deal which allows us to  
7 get money and get out --

8 THE COURT: Okay.

9 MR. FRIEDMANN: -- which was the goal.

10 THE COURT: All right. Very well. When I focus  
11 on return, it is because I'm fully aware that there's an  
12 intermediary here that's actually holding the money and I  
13 just wanted to make sure I knew where the money -- when you  
14 say return, where I was going. But the record's clear on  
15 that.

16 MR. FRIEDMANN: All right. Thank you.

17 MR. GENSBURG: Good morning, Your Honor. Matthew  
18 Gensburg on behalf of the school district.

19 THE COURT: Good morning.

20 MR. GENSBURG: We do have an agreement. The  
21 Village is a party to the agreement for some of the clauses  
22 that involve what they need to do. It was just filed today  
23 and I think is set up for approval by the Court after notice  
24 sometime next week.

25 THE COURT: Okay.



1 MR. GENSBURG: There is one paragraph that I do  
2 want to highlight. There's paragraph 11 -- and there's two  
3 paragraphs, actually. So paragraph 11, Your Honor, says  
4 that we're withdrawing our -- thank you -- withdrawing our  
5 claims -- cure objections but then it says we're not  
6 withdrawing any cure objections that we're asserting them.  
7 The fact of the matter is, is cure objections are being  
8 preserved and the ability to argue that the EDA agreement  
9 cannot be assumed and assigned because of violations to that  
10 agreement are being preserved.

11 I've been exchanging e-mails with Mr. Friedmann.  
12 I think we both understand what the intent was. We may have  
13 to clarify that language but that's the intent.

14 The other thing I wanted to highlight to the Court  
15 is it does provide the automatic stay will be modified to  
16 the extent it's applicable because of the resolution that  
17 states not asserting an interest in these assets any longer  
18 and that the Court will defer -- rule on the cure issues to  
19 allow the state court to resolve the underlying state law  
20 issues that are also implicated by the cure issues. And  
21 that's, I believe, in paragraph 15.

22 THE COURT: I had earlier lifted the stay in part.  
23 And this lifts it further? Is that the contemplation?

24 MR. GENSBURG: No -- yeah. Actually, Your Honor,  
25 I think it was -- you abstained in the 1334(c) --

1 THE COURT: To what was already going on.

2 MR. GENSBURG: Yes. And so this relates exactly  
3 to that. It doesn't really change anything but we --

4 THE COURT: Right.

5 MR. GENSBURG: -- just clarified that point with  
6 respect to the cure and the 365 issues.

7 THE COURT: Okay. All right. Very well.

8 MR. GENSBURG: Thank you, Judge.

9 THE COURT: Thank you.

10 MR. SCHROCK: Okay. So that's I and 1(M).

11 Number -- pardon me.

12 (Pause)

13 MR. SCHROCK: I think we just have a partial  
14 resolution -- you know, frankly -- ESL still has a number of  
15 pending objections. So I'll just note what's resolved  
16 during the course --

17 THE COURT: Okay.

18 MR. SCHROCK: -- of oral argument.

19 The item number 21 in the objection chart, which  
20 is at ECF number 4721, item 1(XX), has been resolved. Those  
21 are -- well, it's one of the Whitebox objection. That is --  
22 they're one of the parties to the administrative claim  
23 consent program.

24 THE COURT: Right. Okay. So the Whitebox  
25 objection is resolved.

1 MR. SCHROCK: It's resolved in totality, yes.

2 THE COURT: Okay.

3 MR. SCHROCK: Let's see if we have any more here  
4 through the Court's -- and I believe, Your Honor, that wraps  
5 it up. The remainder, at least of this moment, remain  
6 outstanding. And I think what we would like to do at this  
7 time, Your Honor, is just move straight to the evidence.

8 THE COURT: Okay. I'll note, though, that at  
9 least with respect to some of the objections that were  
10 resolved, the debtors have proposed clarifying language not  
11 just for those objections but similar objections that you  
12 haven't stated were resolved that, for example, make it  
13 clear that the plan injunction doesn't --

14 MR. SCHROCK: Affect the setoff and recoupment.

15 THE COURT: -- preclude setoff or setoff -- setoff  
16 or recoupment or somehow circumvent cure obligations or  
17 assignment and assumption orders or previously lifted -- or  
18 where the stay was previously lifted or the Court had  
19 already previously abstained. It doesn't rewrite past  
20 history.

21 MR. SCHROCK: Correct.

22 THE COURT: So those agreements by the debtors are  
23 not limited to the people who actually said yes to the  
24 debtors.

25 Okay. So why don't we move -- unless anyone has

1 anything further to say on resolved objections, why don't we  
2 move to the rest of the confirmation hearing?

3 MR. SCHROCK: Okay. Yeah. Your Honor, I think I  
4 can handle the first one here. It's -- the first witness we  
5 have a -- the declaration of Prime Clerk from Mr. Craig  
6 Johnson. It's at ECF number 5137. And we'd like to move  
7 his declaration into evidence.

8 THE COURT: Okay. Does anyone wish to cross-  
9 examine Mr. Johnson?

10 Okay. And this was on noticing and --

11 MR. SCHROCK: Balloting.

12 THE COURT: -- balloting?

13 MR. SCHROCK: Yes.

14 THE COURT: Okay. I will accept that declaration  
15 as his direct testimony.

16 (Declaration of Craig E. Johnson of Prime Clerk LLC re  
17 solicitation of votes and tabulation of ballots received in  
18 evidence)

19 MR. SCHROCK: Okay. Thanks, Your Honor.

20 I'm going to turn the podium over to my partner,  
21 Mr. Genender.

22 MR. GENENDER: Good morning, Your Honor. Paul  
23 Genender, Weil, Gotshal & Manges, for the debtors.

24 We have three witnesses to call -- three  
25 additional witnesses to call this morning. The first we

1 would call would be Bill Transier, Your Honor. His  
2 declaration has been filed on September 13th, 2019, at ECF  
3 number 5146.

4 THE COURT: Okay.

5 MR. GENENDER: He's in the courtroom, Your Honor.

6 THE COURT: Okay. Mr. Transier, could you take  
7 the stand, please?

8 (Pause)

9 THE COURT: Would you raise your right hand,  
10 please?

11 (Witness sworn)

12 THE COURT: And it's William T-R-A-N-S-I-E-R?

13 THE WITNESS: Yes, sir.

14 THE COURT: Okay. So, Mr. Transier, I have the  
15 declaration of yours dated September 13, 2019 which is  
16 intended to be your direct testimony in this confirmation  
17 hearing. Sitting here today, is there anything in it that  
18 you wish to change?

19 THE WITNESS: No. No, sir.

20 THE COURT: And you understand that it's your  
21 direct testimony?

22 THE WITNESS: Yes.

23 (Declaration of William Transier, dated 9/13/19,  
24 submitted as direct testimony received in evidence)

25 THE COURT: Okay. Does anyone want to

1 cross-examine Mr. Transier?

2 MR. WANDER: Yes, Your Honor.

3 THE COURT: Okay.

4 (Pause)

5 CROSS-EXAMINATION

6 BY MR. WANDER:

7 Q Good morning, Mr. Transier. My name is David Wander of  
8 Davidoff Hatcher & Citron. And I represent the -- three of  
9 the objecting creditors.

10 Mr. Transier, you're going to be a member of the  
11 liquidating trust board, correct?

12 A Yes. I've been asked to join them.

13 Q Okay. Now on October 1, in the evening, the debtor  
14 filed document 5292, Notice of Filing of Revised Plan  
15 Supplement in Connection with Modified Second Amended Joint  
16 Chapter 11 plan of Sears Holdings Corporation and its  
17 Affiliated Debtors. Annexed to that document is an Annex B  
18 which is page 58 and 60. And it says "Liquidating Trust  
19 Board Member Compensation. (a) Base Compensation: The  
20 base" -- and I'm quoting now. "The base compensation of  
21 each member of the Liquidating Trust Board shall be [dollar  
22 sign] [blank] per member, which amount shall be paid in  
23 twelve equal installments on a monthly basis in advance."  
24 And it has footnote 5. And footnote 5 says, "Note to Draft:  
25 The annual base compensation of each member of the

1 Liquidating Trust Board shall be disclosed prior to the  
2 Confirmation Hearing."

3 Can you tell me how much is the base compensation of  
4 each member of the liquidating trust board?

5 A I cannot. It's my understanding that that is still  
6 being discussed with the UCC. And I'm not aware of what  
7 that compensation is.

8 Q You have no knowledge at all of what the possible  
9 ranges of the compensation would be?

10 A I don't at this time, no.

11 Q Do you have any idea what the minimum amount or the  
12 maximum amount --

13 MR. GENENDER: Objection, Your Honor. He just  
14 answered that question.

15 THE WITNESS: I do not.

16 BY MR. WANDER:

17 Q Okay. And do you know why the annual base compensation  
18 of each member has not been disclosed prior to the  
19 confirmation hearing?

20 A I think that there has been extensive discussions of  
21 two of the other members that are proposed to the  
22 liquidating trust board with counsel for the UCC. And I  
23 have not been party to those conversations.

24 Q Okay. Paragraph (b) of this Annex B is labeled  
25 "Incentive Compensation". Can you describe the incentive

1 compensation to which you might be entitled?

2 A I cannot. I think that's part of the discussions,  
3 ongoing discussions, about what the compensation should be.  
4 And I know that it's an open item in the confirmation  
5 briefing that will be filled in due course.

6 Q There's a third item. It's just a footnote 6. Do you  
7 know if there's any other compensation that's being  
8 discussed other than the base compensation and the incentive  
9 compensation?

10 A I don't believe that there is.

11 MR. WANDER: Okay. Thank you.

12 THE COURT: Okay. Does anyone else have any  
13 questions for Mr. Transier?

14 Okay. You can step down, sir. Thank you.

15 THE WITNESS: Thank you, Your Honor.

16 MR. GENENDER: Your Honor, may Mr. Transier be  
17 excused?

18 THE COURT: Yes.

19 MR. GENENDER: Your Honor, as a housekeeping  
20 matter, the parties have submitted to Your Honor joint  
21 exhibits. And I would like to formally move them -- offer  
22 them into evidence for record purposes.

23 THE COURT: Well, when you say the parties, who --

24 MR. GENENDER: The debtors and we certainly worked  
25 with Wilmington Trust. And I believe the administrative



1 claimants.

2 THE COURT: Okay. All right. That's fine. They  
3 are agreed deemed admitted.

4 MR. GENENDER: Thank you.

5 (Joint exhibits of debtors, Wilmington Trust and  
6 administrative claimants received in evidence)

7 MR. GENENDER: Your Honor, next, the debtors would  
8 call Brian Griffith. He submitted two declarations, one on  
9 September 13th, 2019, docket 5148, and one on October 1,  
10 2019, a supplemental declaration at 5297.

11 THE COURT: Okay.

12 MR. GENENDER: And he's in the courtroom, Your  
13 Honor.

14 THE COURT: Okay. Would you come up to the stand,  
15 please?

16 (Pause)

17 THE COURT: Would you raise your right hand?

18 (Witness sworn)

19 THE COURT: And it's B-R-I-A-N, G-R-I-F-F-I-T-H?

20 THE WITNESS: Correct.

21 THE COURT: Okay. So, Mr. Griffith, you've  
22 submitted two declarations as your direct testimony in this  
23 confirmation hearing. One's dated September 13th and then  
24 you have a supplemental declaration dated October 1st.  
25 Sitting here today, is there anything in them that you would

1 wish to change as your direct testimony?

2 THE WITNESS: No, Your Honor.

3 THE COURT: Okay. Very well.

4 (Declarations of Brian Griffith, dated 9/13/19 and  
5 10/1/19, respectively, submitted as direct testimony  
6 received in evidence)

7 THE COURT: Does anyone wish to cross-examine Mr.  
8 Griffith?

9 MR. FOX: Your Honor, Edward Fox from Seyfarth  
10 Shaw on behalf of Wilmington Trust.

11 Your Honor, I just want to note, I'm not going to  
12 cross-examine Mr. Griffith but we did take his deposition  
13 and designated portions of his deposition which Your Honor  
14 has.

15 THE COURT: That's part of the exhibit book.

16 MR. FOX: Yeah. I'm sorry?

17 MR. GENENDER: They're not in the exhibit book.  
18 They were --

19 THE COURT: But it's part of the agreed exhibits?  
20 I want to make sure I have them, that's all.

21 MR. GENENDER: My understanding is they were  
22 submitted to the Court, Your Honor, yes.

23 THE COURT: Okay.

24 MR. FOX: So we'll rest on that, Your Honor.

25 THE COURT: All right. That's fine.

1 Does anyone else have questions for Mr. Griffith?

2 (Pause)

3 CROSS-EXAMINATION

4 BY MR. WANDER:

5 Q Good morning, Mr. Griffith. David Wander of Davidoff  
6 Hutcher & Citron.

7 First, I'd like to ask you the questions that I asked  
8 Mr. Transier. Are you familiar with the annual base  
9 compensation of each member of the liquidating trust board?

10 A I'm not, no.

11 Q But have you been involved in any of the negotiation?

12 A I have not.

13 Q In paragraph -- I'm looking at your declaration,  
14 document number 5148. And if I could turn your attention to  
15 paragraph 14, you state in the first sentence, "Further, I  
16 understand the Debtors may require the proceeds of, among  
17 other things, the ESL Litigation (defined below) to fund  
18 payments under the Plan." Do you see where I'm referring  
19 to?

20 A Yes.

21 Q Okay. It's possible that the debtors will not receive  
22 any funds as a result of the ESL litigation, correct?

23 A It's possible. But we're also saying that it's not  
24 necessarily required.

25 (Pause)

1 Q Now in paragraph 55 of your declaration, it refers to  
2 "Cash on Hand". Do you see that?

3 A Yes.

4 Q Okay. And it talks about approximately \$50.1 million  
5 in unrestricted cash on September 21. Do you see that?

6 A I do.

7 Q And as of today, approximately how much is the  
8 unrestricted cash?

9 A Approximately 46 million, 46 and a half.

10 Q And what happened to that four million approximate  
11 dollars?

12 A I believe it was used to fund the professional fee  
13 carve-out account.

14 Q Thank you. And footnote 6 makes a reference to the  
15 carve-account. Do you see that?

16 THE COURT: You mean, footnote -- I'm sorry.  
17 Footnote 6 in what -- in that paragraph or --

18 MR. WANDER: On that page. On page 29 of document  
19 5148 right below paragraph 55, there's a footnote 6.

20 THE COURT: Right.

21 BY MR. WANDER:

22 Q And it says, "This does not include the Carve-Out  
23 Account". Do you see where I'm reading?

24 A Yes.

25 Q And approximately how much money is in the carve-out

1 account as of today?

2 A Approximately, I think it's around \$50 million.

3 (Pause)

4 Q Now in paragraph 56 of your declaration, you discuss  
5 additional asset proceeds. Do you see that on your  
6 declaration?

7 A I do.

8 Q Okay. And you talk about, "n addition to the cash on  
9 hand, additional assets of the Estates include a total of  
10 \$130.4 million". Do you see that?

11 A I do.

12 Q And the first line -- or the first item you mention is  
13 the "Calder Net Proceeds". As of today, how much do you  
14 expect the estate to recover from the Calder net proceeds?

15 A We are still in negotiations with the Calder parties on  
16 that deal. I think, as we say in my testimony, it's --  
17 could be from \$10 million potentially 8 million depending on  
18 how we settle with the other parties.

19 Q What's the lowest amount that's possible?

20 A We haven't come to a final conclusion so I don't know.

21 Q No. But what is the -- is a high and a low. What is  
22 the lowest amount possible based upon your current  
23 negotiations?

24 A I mean, it's hard to say. We don't have a final  
25 agreement yet. So we're not -- it isn't -- I'm not sure I'm

1 following the question.

2 Q Well, has there been any offer by the other side to  
3 give the estate x dollars?

4 A They've offered six million but we're not willing to  
5 accept that because we have, we think, a much better case  
6 pursuing what we've laid out here.

7 Q And how long do you expect those negotiations to take?

8 A Again, it's very hard to say. We're in active  
9 negotiations with them. But we have not come to a  
10 settlement yet.

11 Q And how long have you been having active negotiations?

12 A I'd say the last month.

13 Q The next line item is real estate proceeds, 13.1  
14 million. Do you see that?

15 A I do.

16 Q And as of today, what's your best estimate of the real  
17 estate proceeds?

18 A Same as what we have in here.

19 Q The next line item is de minimis assets \$5.3 million.  
20 Do you see that?

21 A I do.

22 Q And as of today, what's your best estimate as to the de  
23 minimis assets to be recovered?

24 A I still believe the number we have in here is  
25 conservative. We've heard numbers that could be as much as

1 10 million but we're not relying on that. I believe it's 5  
2 million in the near term recoveries.

3 Q And the next line item is 2017 EDA funds. As of today,  
4 what's your best estimate of that as additional asset  
5 proceeds?

6 A It's the same. It was already discussed this morning.  
7 It's 5.1 million.

8 Q Okay. The next line item is Transform 503(b)(9)  
9 obligations, \$97 million. Do you see that?

10 A I do.

11 Q And as of today, what's your best estimate on the  
12 recovery from Transform on 503(b)(9) obligations?

13 A The same as what's in my declaration.

14 Q You're expecting Transform to pay \$97 million in  
15 503(b)(9) claims?

16 A That would be my expectation, yes.

17 Q Okay. And have -- has the debtor given Transform a  
18 list of the 503(b)(9) obligations that the debtor would  
19 expect Transform to pay?

20 A I believe they've seen the list of the 503(b)(9)  
21 claimants. Not anything that specifically speaks to this 97  
22 million directly but they understand, I think, the  
23 mechanics.

24 Q No. My question is has the debtor given Transform a  
25 list of the 503(b)(9) claims that the debtor believes

1 Transform should be paying?

2 A We have not split the 503(b)(9) obligations between  
3 what we would be retaining and what Transform would be  
4 responsible for paying, no.

5 Q Okay. So the debtor -- I want to be clear on this.  
6 The debtor has not given a list to -- if Transform said it  
7 would pay the \$97 million today, has the debtor given  
8 Transform a list of the 503(b)(9) claims that Transform  
9 should be paying with that \$97 million?

10 A Not to my knowledge.

11 Q Okay. So the debtor has not given Transform a list of  
12 the 503(b)(9) claims that the debtor believes Transform  
13 should pay, is that correct?

14 MR. GENENDER: Your Honor, I think I've heard it  
15 four times.

16 THE WITNESS: Yeah. I thought we've answered it.

17 THE COURT: Yes.

18 BY MR. WANDER:

19 Q Now if you can turn your attention to paragraph 61 of  
20 your declaration.

21 A Okay.

22 Q It has a heading "Transform 503(b)(9) Obligations". Do  
23 you see that?

24 A I do.

25 Q Now in the last sentence, you refer to the \$97 million



1 on account of 503(b)(9) claims. Do you see that?

2 A I do.

3 Q But then you go on to say, "which may be offset  
4 depending on how the Specified Receivable and Prepaid  
5 Inventory issues are resolved". Do you see that?

6 A I do.

7 Q And can you explain that?

8 A This is subject to ongoing litigation with Transform  
9 under the EPA. So there is still the opportunity and  
10 potential that there is some type of reduction to the  
11 obligation they're required to take. Our position is that  
12 we still have the right to (indiscernible) and position on  
13 these amounts.

14 Q Well, how much is Transform saying should be offset  
15 based upon specified receivables?

16 A I don't know the number off the top of my head but I  
17 think it's rather large.

18 Q Approximately.

19 A It may be 50 to 60 million.

20 Q And how much is the prepaid inventory issue,  
21 approximately?

22 A I think it might be about five million.

23 Q Isn't it true that Transform has taken the position  
24 that it doesn't owe any of that \$97 million on account of  
25 the 503(b)(9) claims?

1 A It's possible.

2 Q Isn't that Transform's position that it doesn't owe any  
3 money on the 503(b)(9)?

4 A There are a lot of open items on the litigation with  
5 Transform. I don't know the exact position they're taking  
6 on that.

7 Q So as of today, would it be fair to say that it's  
8 unclear whether the debtor will receive any of the \$97  
9 million?

10 A I'd be speculating. I don't know. This is what we  
11 believe is still owed to the estate.

12 Q Well, would you be speculating that the debtor would  
13 recover the \$97 million?

14 A It's open to litigation at this point. So I don't have  
15 an answer on that.

16 Q If you could turn your attention to paragraph 67 in  
17 your declaration. Now this relates to recoveries of  
18 preferential transfers, correct?

19 A That's right.

20 Q And you're estimating a recovery range -- you put down  
21 \$100 million as reasonable?

22 A That's right.

23 Q And of that \$100 million, how much do you project the  
24 debtor will recover by the end of 2019?

25 A Hard to say. I think that's really based on what the

1 preference actions and the preference firms are able to  
2 bring in over the next three months. Again, I'd be  
3 speculating on the exact amount in the next two to three  
4 months.

5 Q Okay. Well, what's your best guess to the nearest 10  
6 million of what the recovery by the end of the year? Do you  
7 have any idea?

8 A Fifteen to twenty million would be just a guess.

9 Q Oh, I don't want you to guess.

10 A Okay. I don't have a --

11 Q So do you have any --

12 A I don't have a great idea, no.

13 Q Sure. Okay. And without guessing, can you tell me how  
14 much in preference recoveries you believe the debtor will  
15 recover in 2020?

16 A I believe what we are anticipating is another 60  
17 million or so.

18 Q In 2020?

19 A Yes. I think that's correct.

20 Q Okay. And what about in 2021? Approximately, how much  
21 of the \$100 million are you going to recover -- the debtors'  
22 estate will recover or the liquidating trust will recover in  
23 2021?

24 A It would be the balance of whatever we just laid out  
25 for 2019/2020. So the balance would be in 2021. So maybe

1 that's another \$20 million.

2 Q Okay. So is it your testimony that you believe the  
3 debtor will recover all of the potential preference  
4 recoveries totaling \$100 million by the end of 2021?

5 A That would be my assumption, yes.

6 Q Okay. Now what do you base that assumption on? And  
7 let me tell you why I'm curious about this. I'm negotiating  
8 a settlement with one of the companies that has been  
9 retained by the debtor. It's a 2010 bankruptcy, I believe,  
10 PCD Communications. And we're still finalizing the  
11 settlement and it's about eight years later. So I'm trying  
12 to understand why you think --

13 THE COURT: Is that testimony, Mr. Wander?

14 MR. WANDER: No. That was --

15 THE COURT: Do we need to say when the demand was  
16 made and when the complaint was filed and all of those  
17 points, too?

18 BY MR. WANDER:

19 Q Well, in your estimate of the recovery by 2021, does  
20 that assume complaints will be filed, answers, discovery,  
21 trials on ordinary course of business defenses and  
22 everything will be completed by 2021 resulting in \$100  
23 million recovery?

24 A It's based on the discussions we've had internally and  
25 with the preference firms that we've retained.

1 Q Okay. So the record's clear, you expect it all to be  
2 completed by the end of 2021.

3 MR. GENENDER: Objection. Restates his testimony.  
4 He said that's his assumption. He's misstating his  
5 testimony.

6 THE WITNESS: We've been more focused over the  
7 last -- over the next, call it 12 to 15 months. So anything  
8 past that period, it is my assumption but I don't know  
9 exactly.

10 BY MR. WANDER:

11 Q No. It's possible that the preference litigation could  
12 go on for five years, isn't it?

13 A Anything's possible, yes.

14 Q Is it possible that it would go on for five years as it  
15 would be completed in two?

16 A I'd be speculating. I don't know.

17 Q Well, is your testimony that in the analysis of the  
18 other large bankruptcy cases that was done that the  
19 litigation -- the preference litigation is usually concluded  
20 in about less than three years?

21 A I'd say the majority of the preference recoveries are.  
22 I don't know the tail on the last pieces of it but the  
23 majority of it is, to my understanding.

24 Q How long do you think the ESL litigation might take?

25 A It all depends on if there's potential settlements

1 involved, what happens with the D&O policy recoveries, and  
2 ultimately if there's a settlement with ESL.

3 Q So as of today, you have no idea how long it might  
4 take.

5 A I'd be speculating. I don't know.

6 Q Now if you could turn your attention to paragraph 75.  
7 And there's a heading above that, "Claims to be Satisfied".  
8 Do you see where I'm referring to?

9 A I do.

10 Q And in the second line of the first sentence, it refers  
11 to the -- I'll just read the beginning part:

12 "As detailed in the Murphy Declaration, the Debtors,  
13 with the assistance of their financial advisors, have been  
14 carefully tracking administrative expense claims (including  
15 503(b)(9) claims)" -- do you see where I'm reading?

16 A Yes.

17 Q How do you think the debtor and its financial advisors  
18 have been doing so far with respect to carefully tracking  
19 administrative expense claims?

20 A As I think it says here, this is more detailed in the  
21 Murphy declaration. He's been in charge of handling most of  
22 the claims side of this analysis.

23 Q Okay. I'll save some questions then for Mr. Murphy  
24 instead of asking you on that.

25 Now if you could look at paragraph 76 of your

1 declaration, you state in the middle, " I believe the  
2 Debtors will be able to satisfy Administrative Expense  
3 Claims, Secured Claims". Do you see where I'm reading?

4 A I do.

5 Q Okay. And what year do you believe the debtors will  
6 likely be able to satisfy all allowed administrative expense  
7 claims?

8 A Again, that's to be determined. It could take months.  
9 It could take slightly longer than months. We have five or  
10 six kind of major items that are still in play for the  
11 estate --

12 Q It could take some --

13 A -- that we'll decide.

14 Q I'm sorry. I didn't mean to interrupt.

15 A So, first of all is how many administrative claims will  
16 actually be allowed. We have not gotten to that point yet.  
17 So we don't know the size of that pool precisely. How many  
18 of those that are actually allowed will opt in to the admin  
19 consent program? When do the preference dollars come in as  
20 you talked about? What happens with the ESL litigation and  
21 D&O settlements? And just all the other remnant asset  
22 recoveries, how quickly can we bring those in?

23 Q Now so the preference recoveries are approximately \$100  
24 million. That sounds pretty important in order to get  
25 administrative claims paid. Would you agree?

1 A It'll depend on the size of the ultimate pool and what  
2 happens with the other four or five areas we just laid out.  
3 But it's possible that could be material, yes.

4 Q Right. And getting those preference recoveries could  
5 go into at least 2021, correct?

6 A The tail piece of it, potentially.

7 Q And the ESL litigation can take several years, correct?

8 A It'll depend on what we were able to settle and how  
9 quickly.

10 Q Well, so as of today, you have no idea whether you'll  
11 be able to pay --

12 MR. WANDER: Oh, strike that.

13 BY MR. WANDER:

14 Q Now allowed administrative claims, there are a bunch of  
15 disputes over administrative claims, aren't there?

16 A That's correct.

17 Q Like hundreds of millions of dollars in disputes?

18 A It depends. Again, this is probably better covered  
19 under the Murphy declaration.

20 Q Well, you've read the Murphy declaration, right?

21 A I have.

22 Q Right. And doesn't it refer to over a billion dollars  
23 in administrative claims being filed?

24 A I'd have to refer to the Murphy declaration. I don't  
25 have it -- I don't believe I have it in front of me.



1 Q Well, do you recall in the Murphy declaration, it  
2 indicating that most of the objections to administrative  
3 claims have not been filed?

4 MR. GENENDER: Your Honor, I'm going to object.  
5 He's outside the scope of his direct. And he will have a  
6 chance to ask Mr. Murphy these questions. So foundation,  
7 Your Honor.

8 MR. WANDER: Well, Your Honor, I believe he --

9 THE COURT: Well, paragraph 76 says "Based on my  
10 understanding of the Murphy and Transier declarations". So  
11 --

12 MR. GENENDER: If I could have a copy of it, I  
13 could respond. But --

14 THE COURT: Right.

15 MR. GENENDER: -- I didn't understand there were  
16 tons of duplicate claims --

17 THE COURT: So you can --

18 MR. GENENDER: -- that were filed. I don't know  
19 the basis to --

20 THE COURT: Yeah. You could --

21 MR. GENENDER: -- these numbers.

22 THE COURT: One of you should provide him with a  
23 copy.

24 MR. WANDER: Oh. I'll save those questions for  
25 Mr. -- are you saying Mr. Murphy is better equipped to

1 respond to that?

2 MR. GENENDER: He can respond to his own  
3 declaration, yes.

4 MR. WANDER: Well -- okay.

5 BY MR. WANDER:

6 Q I'd like to turn your attention to the last couple of  
7 paragraphs starting with paragraph 88. And it refers to the  
8 carve-out account.

9 Now there's a reference in paragraph 88 to a  
10 termination notice. Do you see that?

11 A I do see it, yes.

12 Q Can you explain that to me, how this carve-out account  
13 works and the funding and the termination notice?

14 A My understanding, as long as there were secured claims  
15 outstanding for the estate that we'd be operating under the  
16 DIP order. And to the extent that that was to be  
17 terminated, somebody would have to file a termination notice  
18 of that order.

19 Q And who would be the party to send or file this  
20 termination notice?

21 A I don't know.

22 Q Well, are you saying that until the termination notice  
23 was sent or filed then every week funds would be taken out  
24 of the debtors' accounts and put into the carve-out account?

25 A As long as the order was still in place, yes.

1 Q Okay. So how could that procedure end as a practical  
2 matter in this case?

3 A Somebody would file a termination notice.

4 Q And who is that?

5 A I don't know.

6 Q Do you know who would know?

7 A I don't.

8 Q So until this termination notice is filed by someone,  
9 we don't know who, every week funds get taken out of the  
10 debtors' accounts and fund the carve-out account, is that  
11 it?

12 A As long as secured claims are outstanding, yes.

13 Q And what secured claims are still outstanding?

14 A My understanding is it was the intercompany claims that  
15 were being processed post-petition.

16 Q So there are no claims other than intercompany claims,  
17 no secured claims currently outstanding.

18 A To my knowledge, those are the ones that I've been  
19 relying on, yes.

20 Q Okay. So if the remaining secured claims are  
21 intercompany claims, wouldn't then that be the debtor who  
22 would say there are no secured claims outstanding and would  
23 submit a termination notice?

24 A But they were outstanding. So we wouldn't submit a  
25 termination notice.

1 Q Okay.

2 MR. WANDER: No further questions. Thank you.

3 THE COURT: Okay. Does anyone else want to  
4 cross-examine Mr. Griffith?

5 Mr. Griffith, paragraph 77 of your declaration,  
6 the second sentence, says "I believe the Debtors have  
7 sufficient Assets to pay all Administrative Expense Claims  
8 as of the Effective Date and require at most a short delay  
9 of the Effective Date to allow for the monetization of  
10 significant assets".

11 Can you put any more flesh on what you mean by a  
12 short delay?

13 THE WITNESS: As I said earlier, I would say it's  
14 several months, but potentially longer depending upon the  
15 tentative five major items that we've laid out as what's  
16 going to make us be able to take to the restructuring  
17 committee what would actually be -- put us in a position to  
18 go effective.

19 THE COURT: Assuming that the administrative  
20 expenses and 503(b)(9) claims are liquidated, i.e., fixed,  
21 the amount is fixed --

22 THE WITNESS: Yes.

23 THE COURT: -- as per Mr. Murphy's declaration, so  
24 you take that variable out of the equation. How does that  
25 affect your assumption regarding the several months delay

1 and what assets you need to fill the gap?

2 THE WITNESS: On that basis, I think what we would  
3 be requiring is, based on the conversations with the  
4 preference firms and their experience, that could probably  
5 take nine months of preference recoveries as long as we also  
6 are working towards a settlement with the D&O policies and  
7 if the recovery on the kind of the remnant assets that we  
8 have out there that we believe will all take less than a  
9 year to kind of recover.

10 THE COURT: So the shortfall is what? About 100  
11 million? I'm just trying to figure out. Assuming Mr.  
12 Murphy's estimates are reasonably accurate, between cash on  
13 hand and --

14 THE WITNESS: Between the cash on hand and the  
15 other assets outside of --

16 THE COURT: Right.

17 THE WITNESS: -- the ESL litigation and the  
18 preference? Is that the question?

19 THE COURT: Yes.

20 THE WITNESS: Yeah. I think that shortfall is  
21 probably -- I'll call it about 100 to 120 million.

22 THE COURT: So other than the miscellaneous  
23 assets, you need recovery from some litigation source of  
24 approximately, what, 15 million, roughly? Twenty million?  
25 I'm just trying to get a sense of it.

1 THE WITNESS: It would be between any further --  
2 we assume right now no further dollars come in on the APA  
3 Transform litigation. So between that, between the ESL  
4 litigation and the preference actions, we would probably  
5 need a little over 100 to 120 million would be my estimate.

6 THE COURT: Okay. Okay. I'll let you -- I just  
7 want to ask a couple more questions.

8 Can you turn to your October 1 declaration?

9 (Pause)

10 THE COURT: If you go to paragraph 5, you note  
11 that you were "personally involved in the negotiations of  
12 the Administrative Expense Claim Consent Program". And then  
13 in the next sentence, the second sentence of that paragraph,  
14 it says:

15 "Over the course of these negotiations, the  
16 Debtors shared this analysis with the Ad Hoc Vendor Group  
17 and the Creditors' Committee and engaged in multiple  
18 diligence discussions in respect to [the] analysis."

19 And the analysis was -- I believe you're referring  
20 back to the first sentence where it says "where extensive  
21 review and analysis was conducted of the Claims asserted by  
22 the members of the Ad Hoc Vendor Group".

23 You see that?

24 THE WITNESS: Yes.

25 THE COURT: So were the discussions just about

1     their claims and the merits of their claims against the  
2     debtors or was the analysis broader and more along the lines  
3     of what you've just been questioned about and that are in  
4     your declarations, i.e., the timing of payments, the  
5     ultimate likelihood of receipt of payments versus claims?

6             THE WITNESS: The initial focus was on the ad hoc  
7     group's claims --

8             THE COURT: Right.

9             THE WITNESS: -- and understanding how quickly we  
10    could get to some type of resolution with them on what would  
11    potentially be an allowed claim.

12            THE COURT: Right.

13            THE WITNESS: And then a potential, you know,  
14    consent amount where they might be willing to reduce. And  
15    then from there, we did do some other analysis around if we  
16    were able to get other portions of the admin claimants to  
17    accept a similar plan, what would that mean in terms of what  
18    do we need to recover from all the assets and how quickly  
19    can we go effective.

20            THE COURT: Okay. So some of the due diligence  
21    discussions were about the topics that you've just been  
22    questioned about.

23            THE WITNESS: Yes.

24            THE COURT: Okay. Were they materially different  
25    than what you have in your declaration and what you've just

1 been questioned about?

2 THE WITNESS: No, Your Honor.

3 THE COURT: Okay. Okay.

4 BY MR. WANDER:

5 Q Picking up on what the judge was just asking about,  
6 were you directly involved in the negotiations with the  
7 other ad hoc group?

8 A I was, yes.

9 Q Okay. And isn't it true that there was a concern by  
10 the ad hoc group that the funds available on December 1 may  
11 be the only funds that would be available for administrative  
12 claims?

13 A Not that I'm aware of. I don't recall that.

14 Q Okay. So I got back up because I forgot about your  
15 supplemental declaration from the other day, so I just want  
16 to --

17 MR. GENENDER: Your Honor, I object. He sat down.

18 THE COURT: I think -- I really don't think you  
19 can raise that at this point.

20 MR. WANDER: I can't ask one question about his  
21 other declaration? I apologize, the other supplemental  
22 declaration?

23 THE COURT: Go ahead, that's fine.

24 BY MR. WANDER:

25 Q I'm looking at your supplemental declaration that's



1 Document 5297 filed on October 1, 2019. And in paragraph  
2 five -- strike that. That was the Judge's paragraph.

3 In paragraph 9, which is on page 5 of 6, six lines from  
4 the bottom you state in the middle, "I believe that the  
5 administrative expense claims consent program allows the  
6 debtors to forgo time consuming litigation in connection  
7 with the plan and the allowance of settled administrative  
8 expense claims."

9 Now, are you -- what litigation are you referring to?

10 A Disputing the amount of the allowed claims.

11 Q Okay. Now, you don't expect all of the administrative  
12 vendor creditors to be caught in the settlement. It would  
13 be fair to say will be some people who don't opt in?

14 A I would agree with that, yes.

15 Q Okay. So isn't one of the outstanding litigation  
16 issues, what we've been referring to as the World Imports  
17 issue?

18 A I believe it is, but again this is probably for the  
19 Murphy declaration.

20 Q Well, can you explain the World Imports issue?

21 A Again, that's probably better described by Mr. Murphy.

22 Q Well, isn't it true that the World Imports issue which  
23 it pertains to approximately \$30 million in foreign vendor  
24 claims?

25 MR. GENENDER: Your Honor, I'm going to object,

1 there's lack of foundation and it's way beyond one question.

2 THE COURT: I think you should talk to Mr. Murphy  
3 about this.

4 MR. WANDER: I'll save it for Mr. Murphy, Your  
5 Honor.

6 THE COURT: Okay.

7 MR. WANDER: Thank you.

8 THE COURT: Does anyone else want to cross-  
9 examine?

10 (No response)

11 THE COURT: You can step down.

12 MR. GENENDER: Your Honor, may I do brief  
13 redirect?

14 THE COURT: Oh, I'm sorry, I didn't know you had  
15 any. Yes, go ahead.

16 MR. GENENDER: I'm not normally so patient, Your  
17 Honor.

18 REDIRECT EXAMINATION

19 BY MR. GENENDER:

20 Q Mr. Griffith, let me hit a couple of points. Do you  
21 under -- with respect to 503(b)(9) claims, do you understand  
22 that the debtors have objected to substantially all of those  
23 claims?

24 A I do.

25 Q And that the debtors are working on resolving the

1 remainder of them?

2 A Yes.

3 Q So that in your mind is there a possibility that there  
4 may not be 503(b)(9) claims?

5 A Very minimal to, yes, it's possible.

6 Q So that would eliminate the discussion you had about  
7 the 97 million, that wouldn't even be an issue; is that  
8 fair?

9 A That's right.

10 Q Thank you. You were asked some questions about the  
11 preference recoveries and the timing. Did you rely on the  
12 professionals, the preference firms, as stated set forth in  
13 your declaration for that testimony?

14 A It was part of it, yes.

15 Q I want to go to some of the questions that -- I'm going  
16 to refer you to your declaration starting with paragraph 62  
17 and walk you through a couple of things. I take that back,  
18 paragraph 55.

19 Your -- would you agree, Mr. Murphy (sic), that your  
20 declaration address --

21 THE COURT: Mr. Griffith.

22 MR. GENENDER: I'm jumping ahead, Your Honor,  
23 thank you.

24 BY MR. GENENDER:

25 Q Mr. Griffith, would you agree that your declaration

1 sets forth various sources of funds.

2 A Yes.

3 Q I'd like to go through and add those up to clarify the  
4 record if that's okay, please. Starting with paragraph 55,  
5 you address cash on hand.

6 A Yes.

7 Q 50.1 million.

8 A Correct.

9 Q As of that date, right?

10 A Yes.

11 Q Paragraph 56 you address total additional proceeds,  
12 130.4 million.

13 A Yes.

14 Q And then you in paragraph 57, 58, 59, 60 and 61 address  
15 those elements, correct?

16 A That's correct.

17 Q And then you address additional litigation proceeds in  
18 the paragraphs thereafter with respect to the preference  
19 actions in the ESL litigation; is that right?

20 A Yes.

21 Q And to the extent there are claims allowed, did you  
22 personally handle that process, administrative claims,  
23 excuse me?

24 A Not personally, no.

25 Q Mr. Murphy did, right?

1 A Correct.

2 Q And you reviewed his declaration?

3 A I did.

4 Q And you understand that -- do you defer to whatever his  
5 conclusions were and observations were as to what if any  
6 administrative claim shortfall there existed, right?

7 A That's correct.

8 Q All right. And do you understand from reading his  
9 declaration that he has a view that there may not be an  
10 administrative claim shortfall at all?

11 A I do.

12 Q If that were the case, how much money would the estate  
13 need to meet a shortfall that doesn't exist?

14 A None.

15 MR. GENENDER: Thank you. One second, Your Honor.

16 Nothing further, Your Honor, thank you.

17 THE COURT: Okay.

18 MR. WANDER: Your Honor, briefly?

19 THE COURT: Sure.

20 RECROSS-EXAMINATION

21 BY MR. WANDER:

22 Q You were just asked some questions about 503(b)(9)  
23 claims I believe, correct?

24 A Yes.

25 Q I thought Mr. Murphy was the one who had that

1 information based on your earlier testimony when I was  
2 asking you very similar questions.

3 MR. GENENDER: Your Honor --

4 THE COURT: No, he said he wasn't going to deal  
5 with the 503(b)(9) claims --

6 MR. WANDER: Right, but --

7 THE COURT: -- he was going to rely on Murphy.

8 BY MR. WANDER:

9 Q I believe that counsel just asked you about the  
10 503(b)(9) claims --

11 THE COURT: No, he didn't.

12 Q -- and asked whether objections to most of those claims  
13 has been filed.

14 MR. GENENDER: I asked if there were objections to  
15 the claims.

16 THE COURT: He's just focusing on the assets.

17 MR. WANDER: Okay. I thought he was -- counsel  
18 was eliciting important testimony from him on the 503(b)(9)  
19 issue that I agreed not to ask him about.

20 THE COURT: As far as objections are concerned,  
21 I'll listen to Mr. Murphy.

22 MR. WANDER: Okay. Thank you, Your Honor.

23 THE COURT: Objections to the 503(b)(9) claims  
24 that have been filed.

25 Okay. You can step down.

1 THE WITNESS: Thank you.

2 MR. GENENDER: Your Honor, at this time the  
3 debtors would call William Murphy who submitted a  
4 declaration on September 13th, 2019 at ECF No. 5149.

5 THE COURT: Okay. If you can take a seat, please.  
6 Would you raise your right hand, please?

7 (Witness sworn)

8 THE COURT: And it's William M-U-R-P-H-Y?

9 THE WITNESS: Yes.

10 THE COURT: Okay. So, Mr. Murphy, you've  
11 submitted a declaration intended to be your direct testimony  
12 in this confirmation hearing that's dated September 13,  
13 2019. Sitting here today is there anything that you wish to  
14 change in it as your direct testimony?

15 THE WITNESS: No, Your Honor.

16 THE COURT: Okay. All right. Does anyone wish to  
17 cross-examine Mr. Murphy?

18 MR. FOX: Your Honor, Edward Fox from Seyfarth  
19 Shaw on behalf of Wilmington Trust, we also designated  
20 portions of the deposition testimony of Mr. Murphy and the  
21 debtors made cross designations. And I believe you have  
22 those and we rest on that.

23 THE COURT: Okay.

24 MS. LIEBERMAN: Good afternoon, Your Honor, Donna  
25 Lieberman, Halperin Battaglia Benzija for Relator Carl

1 Ireland, who's the administrator of the Estate of James  
2 Garbe.

3 CROSS-EXAMINATION

4 BY MS. LIEBERMAN:

5 Q Mr. Murphy, could I ask you to look at your  
6 declaration --

7 A Yeah.

8 Q -- specifically paragraph 29 and in paragraph 55?

9 Mr. Murphy, do you see in those paragraphs that you've  
10 indicated that the estimate for secured claims is \$18  
11 million?

12 A Yes.

13 Q Has anything changed in those estimates to your  
14 knowledge?

15 A No.

16 Q Do you know what secured claims are included in those  
17 estimates?

18 A Your client's claim.

19 Q Are any -- and obviously jointly my client and the  
20 United States, any other secured claims in there -- in those  
21 -- in that \$18 million?

22 A No.

23 Q Mr. Murphy, do you know if the debtors have enough cash  
24 on hand to reserve for those secured claims?

25 A Yes, they --



1 Q Yes, you know or you --

2 A The debtors -- but there's other demands for the cash  
3 that the debtors have on hand.

4 Q I'm not sure I understand. Do you anticipate that when  
5 this -- when the plan goes effective that the debtors will  
6 have enough cash on hand?

7 A Yes, when the plan goes effective, debtors will have  
8 enough cash on hand.

9 Q And do the debtors currently have enough cash on hand  
10 to reserve \$18 million for the secured claim?

11 A The current plan would be to make sure that the funds  
12 are available as of the effective date, which we believe  
13 they're going to be available.

14 Q Mr. Murphy, are you generally familiar with the  
15 administrative claims procedures settlement that recently  
16 got filed?

17 A Yes.

18 Q Are you aware that that contemplates \$20 million being  
19 put in a segregated account?

20 A Yes.

21 Q Will that affect the availability of the debtors to  
22 reserve for the secured claims?

23 A No.

24 Q So even with that \$20 million being segregated solely  
25 for opt in administrative claimants, the debtors have

1 sufficient money to reserve \$18 million for these secured  
2 claims?

3 A As of the effective date, yes.

4 Q What about as of the current date?

5 A No.

6 MS. LIEBERMAN: No further questions, Your Honor.

7 THE COURT: Okay. Does anyone else want to cross-  
8 examine Mr. Murphy?

9 CROSS-EXAMINATION

10 BY MR. WANDER:

11 Q Mr. Murphy, my name is David Wander of Davidoff Hutcher  
12 & Citron. I'm going to first ask you the questions that I  
13 asked others but no one seems to know and this has to do  
14 with the compensation of the liquidating trust board  
15 members.

16 Can you tell me how much is being discussed for the  
17 annual based compensation?

18 A I'm not involved with that, so no.

19 Q And who is?

20 A I don't know.

21 Q Okay. Do you have any idea about the incentive  
22 compensation?

23 A I'm not involved with those discussions.

24 Q Do you know who would know about that?

25 A No.

1 Q I'm going to start out with the question that I was  
2 asking Mr. Griffith regarding the administrative expense  
3 claim settlement. And I was referring to paragraph 9 of his  
4 declaration, document 5297. And he said, "I believe that  
5 the administrative expense claims consent program allows the  
6 debtors to forego time consuming litigation in connection  
7 with the plan and the allowance of settled administrative  
8 expense claims."

9 Can you describe the time consuming litigation that  
10 this settlement will make unnecessary?

11 A If you don't mind, can you repeat the paragraph that I  
12 want to read here?

13 Q Sure. It's paragraph 9 and it starts six lines from  
14 the bottom, we're in the middle of the page, it says, "I  
15 believe that the administrative claims." Do you see where  
16 I'm referring to?

17 A I see the statement, yes.

18 Q And you see the reference to time consuming litigation?

19 A Yes.

20 Q Okay. Other than the objection to the plan by the  
21 Foley & Lardner firm, what time consuming litigation is  
22 going to be resolved by this settlement construct?

23 A To the extent administrative claimants opt in there's a  
24 procedure to review the claims and go forward with the  
25 consent program.

1 Q Well, would it be fair to say that it's very likely not  
2 all of the administrative claimants with 503(b)(9) claims  
3 and the foreign vendors who have those claims are going to  
4 opt in?

5 A That would be speculation. I don't know what they'll  
6 be thinking about.

7 Q Well, isn't one of the litigation issues that remain  
8 unresolved that we refer to as the World Imports issue?

9 A That's -- that will be one of the issues as part of the  
10 objections that will be filed.

11 Q Right. And can you explain what the World Imports  
12 issue is?

13 A I'm not an attorney, but as a businessman, my  
14 understanding it's using a receipt date based on port of  
15 origin versus a domestic receipt date.

16 Q Okay. And that relates to approximately \$30 million of  
17 foreign vendor claims?

18 A I'd have to add up the claims. The 30 million I'm  
19 aware of is the amount of claims that -- the dollar amount  
20 that's, you know, our estimated objection amounts to be  
21 objected to.

22 Q Okay. Now, the World Imports issue is not resolved in  
23 any way by the settlement, correct, it's still out there?

24 A That's correct.

25 Q There are also litigation issues with many of the same

1 vendors having to do with prepetition orders of goods that  
2 were delivered post-petition, correct?

3 A Correct.

4 Q And the administrative claim settlement doesn't resolve  
5 those litigation issues with regard to creditors who do not  
6 opt in, correct?

7 A Correct.

8 Q So the time consuming litigation relating to 503(b)(9)  
9 claims and even 503(b)(1) claims of the foreign vendors are  
10 not resolved by the settlement, correct?

11 A It's a consent program and it's -- it allows a process  
12 where we're able to agree to allowed amounts outside of the  
13 court process.

14 Q But as long as all the creditors haven't opted in, the  
15 time consuming litigation --

16 THE COURT: It's a tautology, you settle/you  
17 settle, you don't/you don't. I get that, Mr. Wander, we  
18 don't need to spend more time on this.

19 MR. WANDER: Okay. I'll move on, Your Honor.

20 THE COURT: Plus which as Mr. Murphy says there is  
21 a mechanism for specifically exchanging information and I  
22 guess progressing a possible settlement with people who  
23 haven't immediately settled.

24 BY MR. WANDER:

25 Q Now, you're a senior director of M3 Partners, correct?

1 A Correct.

2 Q And how long has M3 been involved with Sears?

3 A My understanding is for several years.

4 Q And can you describe M3's role with Sears prior to the  
5 bankruptcy filing?

6 A I cannot.

7 Q Wasn't M3 involved in maintaining and overseeing the  
8 books and records of Sears prior to the bankruptcy?

9 A I joined M3 in December, so I'm not aware of any events  
10 prior to that.

11 Q December of what year?

12 A 2018.

13 Q So you have no knowledge of M3's involvement in the  
14 debtors' books and records prior to the bankruptcy filing?

15 A That's correct.

16 Q I'd like to direct your attention to paragraph 20 of  
17 your declaration which is on page 11. Three lines from the  
18 bottom in the middle you state, "Among other things we found  
19 that historical intercompany data was incomplete and at  
20 times inaccurate creating a possibility of inaccurate  
21 results by orders of magnitude."

22 What do you mean by orders of magnitude?

23 A The total intercompany due to or due from receivable  
24 and payables as of the filing date again netted even at this  
25 level, exceeded \$100 billion. As we evaluated the host

1 petition intercompany balances, we found entries that  
2 depending on which account you looked at may have had  
3 adjustments in the tens and hundreds of millions of dollars  
4 and it took -- it takes to summarize that data particularly  
5 historically is magnitudes of millions and billions of  
6 dollars.

7 Q So when you used the phrase order of magnitude, meaning  
8 a large amount?

9 A Yes.

10 Q Okay. And you continue after the phrase orders of  
11 magnitude, you mention antiquated accounting systems. Do  
12 you see that?

13 A Yes.

14 Q And so those would be the accounting systems that Sears  
15 was maintaining for the several years before the bankruptcy  
16 when M3 was involved in the company, correct?

17 A Yes.

18 Q Do you know -- strike that.

19 Because you weren't with M3, you wouldn't know what --  
20 prior to December 2018, you don't know or do you, why they  
21 maintain this -- continued to maintain an antiquated  
22 accounting system?

23 A M3 wasn't maintaining. The firm was not maintaining  
24 the systems. The debtor, these are the debtors' systems.

25 Q Right. So what was M3's role though with respect to

1       Sears in those couple of years before the bankruptcy when  
2       Sears had an antiquated accounting system?

3               THE COURT: He's already answered this, he doesn't  
4       know. He got here -- you asked him five questions about  
5       this.

6               MR. WANDER: Okay.

7       BY MR. WANDER:

8       Q       Now, if you turn to page 12 of your declaration, there  
9       -- and in particular footnote 5. Okay. You refer to how  
10      information is recorded currently, correct, and you refer to  
11      this People Soft Oracle system.

12      A       Yes.

13      Q       Okay. Now, the last sentence in that footnote you  
14      state, "this process is cumbersome and extremely time  
15      consuming." Can you explain what you mean?

16      A       To evaluate the post-petition intercompany activity, we  
17      work with the now transformed accountants and this was a  
18      three or four month process to summarize post-petition  
19      intercompany activity that was being monitored on a bi-  
20      weekly basis.

21              To summarize that data was a pretty intensive effort on  
22      their part and it was cumbersome and time consuming just for  
23      three or four month period that we were tracking -- you  
24      know, the debtor process was being tracked as part of the  
25      DIP loan agreement.



1 Q And how accurate has that process been?

2 A Accurate enough that we've concluded we -- it was  
3 better to do a plan settlement than to utilize the  
4 intercompany activity even though we had millions of data --  
5 millions of lines of data to -- that they summarized to  
6 identify intercompany receivable and payable activity  
7 between debtors.

8 There was -- we were never able to get down to the raw  
9 data of receivables and activity between both -- any  
10 particular debtor, due to the volume of the data.

11 Q You're talking now about the debtors' currently  
12 accounting, correct? The problems you were just talking  
13 about is now the current post-petition data; isn't that  
14 correct?

15 A The issue is more the volume of the data in summarizing  
16 that data.

17 Q The issue is not at all reconciling the data?

18 A And reconciling it.

19 Q Right. There are major problems the debtor has faced  
20 reconciling the data post-petition, correct?

21 A Which is the current -- what I'm referring to  
22 specifically is the intercompany activities.

23 Q Now, I'd like to turn your attention to paragraph 28 on  
24 page 16 of your declaration and there's a heading, claims  
25 analysis.

1 A Okay.

2 Q Okay. Now, the debtors have asked the Court to set a  
3 bar date for the filing of certain claims, correct?

4 A Yes, they did.

5 Q And the debtor asked the Court for a bar date for  
6 503(b)(9) claims, correct?

7 A Correct.

8 Q And the debtors asked the Court to set a bar date for  
9 unsecured claims, correct?

10 A It was the same date I understand.

11 Q The debtors have not asked the Court to set a date for  
12 administrative claims under 503(b)(9) claims, correct?

13 A That's my understanding.

14 Q And that's been a deliberate choice by the debtor not  
15 to seek that bar date; isn't that correct?

16 A An administrative claim bar date has not been set as  
17 far as the discussions of whether or not to file it. That's  
18 out of my realm of expertise.

19 Q Okay. Well, why would the debtor have the Court set a  
20 bar date for unsecured claims and 503(b)(9) --

21 THE COURT: He just said he doesn't know.

22 MR. WANDER: I'm sorry?

23 THE COURT: He just said he doesn't know, Mr.

24 Wander.

25 BY MR. WANDER:

1 Q There could be a lot of administrative claims that have  
2 not been filed, correct?

3 A I guess anything is possible.

4 Q Well, there hasn't been a bar date, there could be  
5 hundreds of millions of administrative claims that haven't  
6 been filed, correct?

7 A You want my professional opinion?

8 Q I'm asking whether the fact that the debtor has not an  
9 administrative claims bar date could result in there being  
10 hundreds of millions of dollars of administrative claims to  
11 be filed in the case.

12 A My opinion it's unlikely.

13 Q Well, hasn't there been additional administrative  
14 claims being filed last week, the week before? Every week  
15 don't we see additional administrative claims being filed?

16 A I believe so, yes.

17 Q Have you been adding up those additional administrative  
18 claims that have been filed in your calculations of the  
19 total administrative claims that may be allowed in this  
20 case?

21 A Yes. Most of them currently are -- they're included in  
22 the accounts payable that's been outstanding since February  
23 11th.

24 Q You're saying all of the claims that have been filed  
25 recently are listed in the debtors' books as being

1 outstanding payables?

2 A I have to look at all of those motions you're referring  
3 to to know whether I'm accurately answering your question,  
4 but the ones that I've looked at, I find that they're in the  
5 accounts payable.

6 Q And which ones are those?

7 A I'd have to go back and look at the documents. I just  
8 know that as I look at documents and I look at particular  
9 claims when asked, I've found that they've also been in the  
10 accounts payable.

11 Q Well, is it your testimony that administrative claims  
12 that have been filed in the past two weeks, you've checked  
13 and determined that they were listed in the debtors' books  
14 as payables?

15 A No, I can't say that.

16 Q Now, I'd like to turn your attention to paragraph 29  
17 which talks about outstanding claims.

18 THE COURT: I'm sorry, before we go to that, can I  
19 just ask you, Mr. Murphy, you have a paragraph in your  
20 declaration, paragraph 41 that states "other administrative  
21 expense claims" that's the heading for it. And it has a  
22 chart and the first box in the chart says "claims filed to  
23 date." And then you deduct from it objections filed and  
24 anticipated objections claims to be expunged upon  
25 confirmation, and then, plus additional amounts related to

1 post-petition pre-closing accounts payable --

2 THE WITNESS: Correct.

3 THE COURT: -- 30 million.

4 Is that 30 million the accounts payable that you  
5 -- I mean, to put it differently the heading here is claims  
6 filed to date, but then you say plus additional amounts  
7 related to post-petition pre-closing amounts payable. Are  
8 those -- is that 30 million derived at looking at the  
9 debtors' accounts payable books or claims that have actually  
10 been filed?

11 THE WITNESS: It's the former, the --

12 THE COURT: Accounts payable books.

13 THE WITNESS: -- records of accounts payable.

14 THE COURT: So this claims filed to date is not  
15 just the claims filed, but also you're looking at the  
16 accounts payable records.

17 THE WITNESS: Yes, Your Honor.

18 THE COURT: Okay. So even if someone hadn't filed  
19 a claim, the accounts payable records if they show 30  
20 million that's what you put down here.

21 THE WITNESS: Correct.

22 THE COURT: Okay.

23 BY MR. WANDER:

24 Q Well again, is it your testimony that the  
25 administrative claims that have been filed in the last two

1 weeks you cross-referenced and determined they were included  
2 in the \$30 million of payables?

3 MR. GENENDER: Asked and answered, Your Honor. In  
4 response to your question, Your Honor, he just answered it.

5 THE WITNESS: As I answered prior, no.

6 Q Right. So your response to the Judge's question you  
7 indicated that the \$30 million covered possible additional  
8 administrative claims but you just said you haven't checked  
9 claims that haven't been filed in the past two weeks.

10 THE COURT: All right. Let me, do you have  
11 confidence in the debtors' books and records that they  
12 reflect accurately the accounts payable?

13 THE WITNESS: Yes.

14 THE COURT: So if someone filed a bogus claim and  
15 it didn't show up in the accounts payable you wouldn't count  
16 it, right?

17 THE WITNESS: That's correct.

18 THE COURT: All right. Let's move on.

19 MR. WANDER: Look --

20 THE COURT: No, that's enough. I mean, honestly.

21 BY MR. WANDER:

22 Q With regard to the chart the Court was just referring  
23 to it talks about \$1.157 billion in claims filed to date,  
24 correct?

25 A Correct.

1 Q Okay. And then it refers to, it subtracts the \$17.3  
2 million of objections filed to date.

3 A Yes.

4 Q Okay. But no order's been entered by the Court  
5 disallowing those \$17.3 million of claims, has there been?

6 A They've been filed recently. They have not had final  
7 court orders.

8 Q Right. And there's actually not even been any hearing  
9 on it so far, correct?

10 A Not that I'm aware of.

11 Q Okay. And then you subtract \$44 million in additional  
12 anticipated objections. So not only is there no order filed  
13 disallowing those \$44 million of claims, the debtor hasn't  
14 even filed the objections, correct?

15 A Correct.

16 Q So those would be deemed allowed -- to be allowed  
17 pending the filing of an objection, correct?

18 A No.

19 Q A proof of claim filed --

20 THE COURT: It's a legal issue.

21 MR. WANDER: Okay.

22 BY MR. WANDER:

23 Q So going back to paragraph 29 where it refers to  
24 outstanding claims, in subsection A you refer to the  
25 503(b)(9) claims. Do you see that?

1 A Yes.

2 Q Now, you say zero when taking into account transforms  
3 obligations under Section 2.3(k)(IV) of the APA. Do you see  
4 that?

5 A Yes.

6 Q And can you explain how you get the -- well, what's the  
7 -- prior to taking the number down to zero, what's the  
8 starting number that you have for the 503(b)(9) claims?

9 A 90 million.

10 Q Okay. And did you analyze the 503(b)(9) claims using  
11 what I'll refer to as the World Imports analysis or a point  
12 of origin analysis?

13 A We used the debtors' records and their -- the debtors'  
14 records and how the debtor recorded the merchandise on its  
15 books and records, you know, the receipt date that they  
16 used.

17 Q But do you know what is meant when I refer to the World  
18 Imports analysis?

19 MR. GENENDER: Asked and answered, Your Honor.

20 THE COURT: No, you can answer that question, do  
21 you know of that?

22 THE WITNESS: Yes.

23 BY MR. WANDER:

24 Q Okay. Now, is there a list -- has the debtor compiled  
25 the list of 503(b)(9) claims using the point of origin and



1 503(b)(9) claims using a World Imports analysis?

2 A No, there's one reconciliation per vendor and the match  
3 of the debtors' records to the claimant's records were based  
4 on the debtors' receipt dates.

5 Q And the receipt date being when? How did you determine  
6 the receipt date?

7 A The receipt date for foreign vendors was the port of  
8 origin.

9 Q Okay. And what's the difference in amount between  
10 using the point of origin and using the World Imports  
11 analysis, to the nearest \$5 million?

12 A We didn't do that analysis to answer that question. If  
13 you take the objections that the debtors ultimately will  
14 have against the import vendors and you say that all of the  
15 import vendor claims are based on a different date than the  
16 debtors' date, then that objection is in excess of \$30  
17 million, that difference.

18 Q So if it was determined that the World Imports analysis  
19 is the proper way to analyze the receipt date to the foreign  
20 vendor claims there'd be an additional approximate \$30  
21 million in 503(b)(9) claims, correct?

22 A There's additional analysis that would have to be  
23 completed comparing the different receipt dates to the  
24 debtors' records.

25 Q And that might be another \$30 million, correct?

1 A Depending on the analysis.

2 Q Right. I'm saying if the analysis went the other way,  
3 not the way the debtor would like it to go, that analysis  
4 would end up being another \$30 million in foreign vendor  
5 503(b)(9) claims; isn't that correct?

6 A I haven't done that analysis --

7 THE COURT: Well, I'm sorry --

8 THE WITNESS: -- so I can't answer the question.

9 THE COURT: -- I'm not sure I understand whether  
10 you understand the question. Or I understand what you just  
11 said, Mr. Murphy.

12 I think what I heard you say is that if you look  
13 at the amount of the claims of foreign vendors that the  
14 debtors have objected to or will object to its roughly 30  
15 million that's at issue.

16 THE WITNESS: Yes.

17 THE COURT: Is it your testimony that not all of  
18 that 30 million in dispute is attributable to the so-called  
19 World Imports issue?

20 THE WITNESS: Yes, Your Honor, thank you.

21 THE COURT: Okay. So some might be because even  
22 at point of delivery as opposed to point of origin it might  
23 be outside 503(b)(9)?

24 THE WITNESS: Yes, Your Honor.

25 THE COURT: Okay. So the outside would be 30

1 million --

2 THE WITNESS: Yes.

3 THE COURT: -- if all the issues were related to  
4 the so-called World Imports issue, the outside amount, the  
5 aggregate, but you don't know how much within that 30  
6 million would be specifically attributable to the World  
7 Imports?

8 THE WITNESS: Yes, Your Honor, thank you.

9 THE COURT: Okay. All right.

10 BY MR. WANDER:

11 Q But you don't know the difference in amount?

12 THE COURT: No, I just said that.

13 MR. WANDER: Okay.

14 Q So I believe that originally Transform was under the  
15 APA going to pick up approximately 139 million in 503(b)(9)  
16 claims?

17 A Yes.

18 Q And then that number got reduced to 97 million subject  
19 to possible offsets, correct?

20 A Yes.

21 Q And those offsets include a dispute over inventory,  
22 correct?

23 A Yes.

24 Q And it also includes a dispute over receivables,  
25 correct?

1 A Correct.

2 Q And Transform has asserted offsets to the full \$97  
3 million, correct?

4 A I don't know if I would say full amount, but they are  
5 substantial. They have a substantial -- a claim of  
6 substantial reduction.

7 Q Okay. Well, approximately how much reduction, to the  
8 nearest \$10 million?

9 A 60.

10 Q So the 97 million minus the 60 would mean they would  
11 just pick up 37 million?

12 A That would be the math.

13 Q Okay. So there could be -- then what you have in  
14 paragraph 29(a) you have a zero, the number could be 60  
15 million?

16 A Well, subject to that litigation the number could be  
17 higher.

18 Q And when do you expect that litigation to be completed?

19 A I have no idea.

20 Q And as of today, you have no idea as to how much of the  
21 503(b)(9) claims Transform may be legally obligated to pay;  
22 isn't that correct?

23 A Where I stand today they're obligated to pay the 90  
24 million that we estimate would be the 503(b)(9) claims.

25 Q Are you saying you completely discounted all the

1 offsets for inventory and receivables?

2 A I'm not involved in that specific detail.

3 Q So you don't know?

4 A My understanding is it's still a litigated and open  
5 issue.

6 Q Correct.

7 A As far as I know right now we have a claim against them  
8 for the 90 million and 503(b)(9).

9 Q Do you have any idea how Transform is doing these days  
10 financially?

11 A No.

12 Q No idea?

13 A I understand that as any retail operation there's, you  
14 know, they're in retail. But I'm not following their  
15 financial performance.

16 Q Well, isn't it true that the debtor has serious  
17 concerns about Transform's ability to pay any amount that  
18 the Court might deem it liable to pay under the APA?

19 MR. GENENDER: Your Honor, that's beyond the scope  
20 of his direct.

21 MR. WANDER: Well --

22 THE COURT: That's true.

23 MR. WANDER: Your Honor, he has a zero amount  
24 which indicates that Transform is going to pick up all of  
25 those 503(b)(9) claims, could be up to \$97 million of an

1 offset.

2 THE COURT: But he's already answered, he didn't  
3 really examine Transform's ability to pay. So there's  
4 nothing more to go into.

5 BY MR. WANDER:

6 Q Well so Transform may not be able to pay any of the  
7 503(b)(9) claims even if it's deemed illegally obligated to;  
8 isn't that true?

9 MR. GENENDER: Objection, misstates the testimony.

10 THE COURT: Well, you can answer it, you've  
11 answered the question. It's not misstated testimony, just  
12 answer the question.

13 THE WITNESS: If Transform is unable to make  
14 payments then that's an issue.

15 BY MR. WANDER:

16 Q And isn't it true that as of today the debtor has  
17 serious concerns about Transform's financial ability to make  
18 any payments of monies that may be deemed owed under the  
19 APA?

20 A It has to be a concern.

21 Q It's a very big concern right now, isn't it?

22 A I don't know their records, so I can't tell you whether  
23 it's a big concern or a small concern.

24 Q No, I'm talking about, isn't the debtor very concerned  
25 as of today about Transform's financial ability to pay any

1 amount the Judge deems is owed under the APA?

2 A I'm not party to those discussions. I would be  
3 concerned about any party being able to make payments, but  
4 as far as that statement, I can't answer that.

5 Q So you have not been involved in any discussions with  
6 the debtor concerning Transform's financial ability to pay  
7 and concerns by the debtor that it doesn't have the money?  
8 Is that your testimony, you haven't been involved in any  
9 such discussions?

10 A I can't say we haven't had a sidebar discussion by a  
11 water cooler that there's, you know, a potential issue for  
12 any particular company or particular in retail.

13 Q Well, what about not in the water cooler, what about in  
14 a conference room in negotiations with the ad hoc claimants?

15 A I would think it would be a statement that anyone would  
16 have a concern about.

17 Q Okay. Well, is it that anyone would have a concern  
18 about Transform in particular knowing what might be known  
19 about their financial condition today?

20 A Yes.

21 Q Now, in paragraph 31 of your declaration, you refer to  
22 filed claims objections for approximately \$710 million. Do  
23 you see that?

24 A Yes.

25 Q Okay. And based upon orders entered by this Court that

1 a final and non-appealable, how much of those \$710 million  
2 in claim objections of claims have been disallowed?

3 A I'm not aware of any court orders yet addressing the  
4 710 million.

5 Q Because those claim objections have only been recently  
6 filed.

7 A Correct.

8 Q And the debtor has another \$5.8 billion of claims to be  
9 filed in the future.

10 A Yes.

11 Q Okay. Now, if it's taken this long to file \$710  
12 million of these claims, how long do you think it's going to  
13 take for the additional \$5.8 billion in claims to be filed?

14 A I'd have to go through the detail, I believe a  
15 substantial amount of those dollars would be addressed upon  
16 confirmation of a plan.

17 Q Okay. So let's take out the intercompany claims that  
18 would be -- is that what you're referring to, claims that  
19 would be addressed by the plan confirmation?

20 A No, that would be multiple better and duplicate claims.

21 Q Okay. So excluding those, how long do you think it  
22 will take for all of these additional claim objections to be  
23 filed, the ones that need to be filed and won't be expunged  
24 as a result of confirmation?

25 A Well, it includes a legal process. I'd have to discuss



1 it with counsel, but my --

2 THE COURT: Is this all the claims including  
3 unsecured claims in 31? 31 is all the claims, right, not  
4 just admins? Can we focus just on the admins is all we care  
5 about?

6 MR. WANDER: Your Honor, looking at paragraph 29  
7 which defines the outstanding claims, which is what  
8 paragraph 31 is about, and it doesn't seem to include  
9 unsecured claims.

10 THE COURT: I don't know, that was my question.

11 THE WITNESS: The majority of the billions of  
12 dollars would be the debt that's been addressed as far as  
13 the Transform transaction and duplicates.

14 BY MR. WANDER:

15 Q Right. So I'm talking about just outstanding claims,  
16 not unsecured claims, the ones referred to in paragraph 31,  
17 approximately how long do you believe it'll take for all of  
18 those claims to first get filed?

19 A It's probably several months.

20 Q Okay. And when you say several, two to three?

21 A I would think no more, but you know, it's going to be  
22 coordinating with counsel.

23 Q Now which counsel will be filing those claims? Would  
24 that be the debtors' counsel or would that be counsel for  
25 the liquidating trust or both?

1 A The debtors' counsel, is my understanding.

2 Q And approximately how long do you estimate those claim  
3 objections will be litigated until the final resolution?

4 A It all depends on whether we are able to settle before  
5 having to go through a full court process or not.

6 Q Right. But if you have this large amount of claims to  
7 be filed and then litigated, approximately how long do you  
8 think that's going to take?

9 A When you're talking about a large number of claims to  
10 be filed, what are you referring to?

11 Q I'm referring to the claims that you're referring to in  
12 paragraph 31; all the claims, administrative types of claims  
13 that have to get funded fully in order for the plan to go  
14 effective.

15 A My -- from my experience and looking at these claims, I  
16 would expect us to be able to file the claims over the next  
17 couple of months.

18 Q Right. But my question -- we went through that. My  
19 question now is how long do you project the process will  
20 take for those claims to be litigated so that you now know  
21 how much allowed administrative claims have to be funded in  
22 order for the plan to go effective? That could take several  
23 years; isn't that true?

24 A It could, but I don't -- in this case I don't -- you  
25 know, it all depends on how fast we process the claims and

1 the discussions through the court.

2 Q Right. And some of those claims relate to the World  
3 Imports issue, correct?

4 A Yes, with regard --

5 Q That may need to be litigated not just in this court  
6 but either party may lose and take an appeal, correct?

7 A Anything's possible.

8 Q But isn't it likely that this claims adjudication  
9 process just dealing with administrative claims can take  
10 several years.

11 A That wouldn't be our intent.

12 Q I'm not talking about your intent, isn't it likely that  
13 the claims adjudication process of all of these tens if not  
14 hundreds of millions of dollars in numerous claims can  
15 likely take several years.

16 A I'm not equipped to answer that question.

17 Q Okay. Do you know why there's been no bar dates for  
18 administrative claims filed in this case?

19 A No.

20 Q Isn't it true that the debtors deliberately decided not  
21 to file an administrative claims bar date motion?

22 THE COURT: I'm have déjà vu all over again. We  
23 spent ten minutes on this.

24 MR. WANDER: I thought he was the one who was --

25 THE COURT: No, you asked him.

1 MR. GENENDER: It just feels like it was yesterday  
2 but --

3 THE COURT: You asked him already.

4 BY MR. WANDER:

5 Q Now, I hope I didn't ask you this one --

6 MR. GENENDER: I'll take the ender.

7 THE COURT: Go ahead, Mr. Wander.

8 Q If you'd turn to paragraph 44. So in paragraph 44, you  
9 refer to \$44 million of anticipated objections and it talks  
10 about reclassified. Can you explain that?

11 A Yes. Looking at the remaining claims that have been  
12 filed after duplicates, there were about 44 million of open  
13 issues and looking at those claims our view is that the  
14 majority of them will be reclassified to general unsecured  
15 claims, assuming the amounts are agreed to.

16 Q When you say assuming the amounts are agreed to, you  
17 mean the creditor who filed the claim agrees?

18 A A claim was filed with an amount.

19 Q Right.

20 A The debtor doesn't necessarily agree with the total  
21 dollar amounts, but to the extent they agree with the  
22 amounts, the belief is that they would be reclassified as  
23 general unsecured.

24 Q Right. But the creditors may disagree and those are  
25 \$44 million that have to be possibly litigated, they haven't

1       been filed yet, correct?

2       A       You mean the objections have not been filed?

3       Q       Right.

4       A       Correct.

5       Q       And do any of those \$44 million refer to 503(b)(9)  
6       claims by vendors in the Sears Marketplace?

7       A       No.

8       Q       Okay. Now, what about the chart above on page 23 where  
9       it lists the first, second, third, fourth, fifth, sixth,  
10       seventh and eighth claim omnibus claim objections, do any of  
11       those relate to 503(b)(9) claims filed by the Sears  
12       Marketplace vendors?

13       A       They may. I know that's an issue. I just -- I  
14       couldn't tell you which particular objection relates to  
15       that.

16       Q       Sure, I'm not penning you down as to which one. Now,  
17       when you say the word issue, can you explain what issue  
18       there is with regards to those claims?

19       A       I would be inarticulate, so I know that the Marketplace  
20       -- the vendors determined to be a Marketplace vendor have --  
21       we've -- have been identified with vendors without a  
22       503(b)(9) claim.

23       Q       Okay. But the Sears Marketplace vendors, they -- a lot  
24       of them filed 503(b)(9) claims, correct?

25       A       Correct.

1 Q And they -- the creditors claim that the debtors  
2 through their customer the -- or through the party that  
3 bought the goods from the Sears Marketplace, the vendors are  
4 claiming that those goods should be deemed received by the  
5 debtors within 20 days of the bankruptcy, correct?

6 A That would be their assertion.

7 Q Right. And the debtors claiming if they were  
8 considered to be drop ship, that would not be a 503(b)(9)  
9 claim, correct?

10 A I believe that's the issue.

11 Q All right. And that's an issue that has to be  
12 litigated, correct?

13 A The objections have to be litigated, correct.

14 Q And that legal issue relating to the Sears Marketplace  
15 claims have to be litigated.

16 A Yes.

17 Q Now, if you could turn to paragraph 46 of your  
18 declaration where you talked about priority claims. You  
19 reference \$2.37 billion in priority claims filed to date,  
20 correct?

21 A Correct.

22 Q And objections filed to date are only \$14.7 million,  
23 correct?

24 A Correct.

25 Q And have any orders been entered by the Court

1 disallowing any of those \$14.7 million of claims?

2 A Not that I'm aware of.

3 Q Okay. And there's another \$1.55 billion in claim  
4 objections for priority claims.

5 A Yes.

6 Q And do you have any idea how many claimants we're  
7 talking about?

8 A There's -- it's probably 50 to 60. There's one claim  
9 for a billion two.

10 Q Okay. So the 50 or 60 would cover some \$350 million?

11 A Yes, 320 million.

12 Q And who's going to file those claims? Is that going to  
13 be the debtors' counsel or the committee or the liquidating  
14 trust counsel?

15 A My understanding would be debtors' counsel.

16 Q Okay. Now, the committee's counsel they have certain  
17 review or consent rights relating to these claim objections;  
18 isn't that correct?

19 A I have to go back to the disclosure statement and the  
20 plan to answer that question.

21 Q Okay. So sitting here today, you do not know whether  
22 both law firms are going to be involved in the claim  
23 objections for the priority claims?

24 A I do not.

25 Q And sitting here today, do you know whether both firms

1 will be involved in the objections to the administrative  
2 claims?

3 A My understanding is we're coordinating, but the debtors  
4 are going to be filing the objections.

5 Q Well, when you say coordinating, doesn't that mean and  
6 isn't it true that both law firms are going to be involved  
7 in all of these claim objections?

8 A I don't believe so. We -- the debtors are going to be  
9 filing the objections from what I understand, but this is --  
10 you're getting into discussions about what counsels are  
11 deciding, and you know, I'm not driving that bus.

12 Q Is there a budget for Weil Gotshal handling all of  
13 these claim objections and I'm referring to administrative  
14 claims and priority claims that you've stated debtors'  
15 counsel will be filing?

16 A There are estimates for professional fees, but I'm not  
17 aware of a budget.

18 Q Okay. Well, right now I just want to focus on debtors'  
19 counsel who you've indicated will be prosecuting these claim  
20 objections. Is there a round number to the nearest \$10  
21 million that are going to be needed for the legal fees of  
22 debtors' counsel for all of these administrative and  
23 priority claim objections?

24 A You'll have to ask counsel.

25 Q Well, I'm asking you because you're the witness.



1 A I don't have that, no, I can't answer that question.

2 Q Okay. You're the one who's supposed to be able to  
3 determine the assets, the liabilities if there's -- you're  
4 the numbers guy, right?

5 A I'm an accountant. I'm also addressing the claims.

6 Q Among the three witnesses, you're the numbers guy;  
7 isn't that true?

8 A I'm one of the three numbers guys.

9 Q Okay. Can you turn to Exhibit A --

10 A A as in --

11 THE COURT: I'm sorry, are we moving off the  
12 priority claims?

13 MR. WANDER: Oh, I'm moving off the whole main  
14 declaration. I'm going to --

15 THE COURT: Okay. I had a question, Mr. Murphy.  
16 On the priority claims --

17 THE WITNESS: Yeah.

18 THE COURT: -- if you go to page 24 the chart  
19 there, it says "Mias (ph) anticipated objections \$1.55  
20 billion".

21 THE WITNESS: Yes.

22 THE COURT: What is the analysis behind that? I  
23 mean, what is the basis for the objection, just that they  
24 checked the wrong box or are there legal issues involved?

25 THE WITNESS: One claim -- an individual filed a

1 claim on behalf of a pension plan for a billion two.

2 THE COURT: Okay.

3 THE WITNESS: And that should be addressed with  
4 the PGC settlement.

5 THE COURT: Okay. And the other roughly 300  
6 million?

7 THE WITNESS: The others, there's -- they're  
8 primarily litigation, lawsuits, like slip and fall claims.  
9 There's -- at least -- in that, there's a couple of \$100  
10 million lawsuit claims that are covered by insurance.  
11 They're -- you know, someone bought a, you know, piece of a  
12 shirt or something and it caught fire and they're going to  
13 have a hundred million dollar claim against the debtors.

14 THE COURT: Okay.

15 THE WITNESS: That's the type of claims that are  
16 in there.

17 THE COURT: Okay. So to your knowledge, do any of  
18 these claims represent complex issues as to whether someone  
19 has a priority or not, leaving aside the merits of the  
20 amount, just as to whether there's a priority or not?

21 THE WITNESS: Based on my experience in looking at  
22 all the claims my sense was no, but you know, in discussions  
23 with counsel and some of the claims that I was not familiar  
24 with.

25 THE COURT: Okay.

1 BY MR. WANDER:

2 Q Can you describe what you would consider a complex  
3 issue relating to these claims?

4 A It would be a priority claim. Most of the priority  
5 claims relate to either employee or tax issues.

6 THE COURT: You mean legitimate ones?

7 THE WITNESS: Legitimate, yes. So it would be a  
8 priority claim that I'm not familiar with that may  
9 appear to be either a tax or some type of employee related  
10 claim that I would discuss with counsel as to whether, you  
11 know, it's complicated or not.

12 BY MR. WANDER:

13 Q Well, you were answering the Judge's question about  
14 complex claims. Would you consider tax issues in connection  
15 with priority claims to be complex issues or not complex  
16 issues?

17 A It could be complex.

18 Q Got it, thank you.

19 I'd like to turn your attention to Exhibit A to your  
20 declaration. Now, I honestly couldn't understand the chart  
21 and some of the print is really small so I'm going to need  
22 your help walking me through it and understanding what it  
23 means.

24 So can you first read note 11 into the record?

25 A This is page 30 of 75?

1 Q Yes.

2 A So note 11 says, "reductions in column E, reduce and  
3 allow represent debtors' estimated reductions to filed  
4 claims for the following: Some or all of the invoices of  
5 the following invoices have been paid or satisfied through  
6 credits or returns or the debtors' record show the receipt  
7 date of the merchandise was before 9/25 or after" it should  
8 be 10/14, 2018 "or allowed by the Court."

9 Q What do you -- what's meant by "merchandise received  
10 after 10/14/18"? Is that relating to prepetition orders  
11 that were received post-petition?

12 A Well, after 10/14 would be post-petition, correct.

13 Q But you're making a reduction for goods received post-  
14 petition. Aren't goods received post-petition supposed to  
15 be paid?

16 A Yes, that's correct. The reductions primarily relate  
17 to amounts received prior to 9/25.

18 Q Okay. But you also -- I'm trying to understand the  
19 deduction for amounts received after 10/14 and I'm trying to  
20 understand if that has anything to do with goods ordered  
21 prepetition that were received post-petition.

22 A No.

23 Q Okay. So can -- excuse me.

24 A When you say ordered, are you saying invoiced?

25 Q I'm saying ordered. So here, are you familiar with the

1 motion the debtors filed, one of the first day motions I  
2 think it's Document 14, and it included a request to have  
3 \$162 million of goods ordered prepetition but delivered  
4 post-petition allowed as administrative expenses?

5 A No, I'm not.

6 Q Okay. Does your analysis of allowed administrative  
7 claims take into account any of the goods ordered  
8 prepetition that were delivered post-petition?

9 A Our analysis revolves around goods invoiced and  
10 received pre or post-petition and for the 503(b)(9) period,  
11 between that 25 -- that 20-day period between 9/25 and  
12 10/14. When you say ordered, you can order something a year  
13 in advance. Until it's invoiced, it's not an obligation of  
14 the company.

15 Q Well, when the debtor uses the word ordered as in  
16 prepetition goods ordered, do you know whether the debtor is  
17 referring to the invoice date or another date?

18 A I wasn't around when that motion was prepared.

19 Q Okay. You don't know how much of the \$162 million in  
20 goods referred to in the debtors' motion at Document 14 have  
21 been actually paid, do you?

22 A I'm not familiar with that.

23 Q Do you know who would have that information?

24 A The debtors', Transform's accounting groups, their  
25 accounts payable group, whoever was involved with the

1 development of that particular motion.

2 Q So can you walk me through in the column that has note  
3 11 and going down you have 503(b)(9) claims high paren note  
4 9 and that's a \$32 million number, and then 503(b)(9) claims  
5 low note \$966 million number. Can you explain that?

6 A Those are estimates at the time this was put together  
7 of reductions to the 503(b)(9) claims that we were currently  
8 estimating based on our reconciliation effort.

9 Q Okay. Now, with this page in mind, I'd like you to  
10 skip five pages to page 35 of 75.

11 A Okay.

12 Q And now this is your analysis of the 503(b)(9) claims?

13 A Yes.

14 Q And first, tell me what are those bottom line numbers,  
15 where it says Transform, max Transform current estimate and  
16 there's 155 million and there's 90 million.

17 A I think the reference to Transform is an incorrect  
18 reference. It should be max 503(b)(9) and current estimate  
19 503(b)(9).

20 Q So I should just strike the word Transform?

21 A Correct.

22 Q Now, the current estimate, whose estimate is that?

23 A The debtors'.

24 Q And this is an estimate based on July 15, 2019?

25 A Correct.

1 Q And what's the current estimate, the max and current?

2 A Current estimate is 90 million.

3 Q And what's the max?

4 A On this schedule it says 155.

5 Q No, that's as of July 15. I'm asking you what is the  
6 max estimate as of today. You said the \$90 million becomes  
7 99 million, right?

8 A Well, I said the 90 is still 90.

9 Q Oh, sorry, I apologize. So there hasn't been any  
10 change in the current estimate?

11 A Based on objections filed it might go -- it might be  
12 slightly lower.

13 Q Okay. So after duplicates, I'm looking at the top, and  
14 if it's okay with you I'm going to use round numbers.

15 A Sure.

16 Q So the total surviving filed claims is approximately  
17 \$209 million, right?

18 A Correct.

19 Q And then you're subtracting approximately 4.8 million  
20 beneath that, correct?

21 A Correct.

22 Q And the comment says, "Those claims identified in  
23 reclassification group."

24 A Yes.

25 Q Okay. But there's been no -- are these -- does this

1 relate to claim objections that have been filed seeking to  
2 reclassify?

3 A That was as of July 15th. That was before the  
4 objections had been filed.

5 Q So there's obviously no order disallowing any of these  
6 \$4.8 million claims?

7 A These were all estimates.

8 Q Okay. So the next one is the Marketplace vendors. Are  
9 those the claims that we were talking about before?

10 A Yes.

11 Q And again that's just an estimate, it doesn't have  
12 anything to do with any filed claims?

13 A Correct. Let me rephrase that. That relates to the  
14 filed claims that we're --

15 Q I'm sorry --

16 A -- proposing that would be the objection.

17 Q Okay. It doesn't relate to any objections.

18 A Correct.

19 Q Okay. And then the next line item is 19 million is  
20 being deducted for a domestic 503(b)(9) claims, correct?

21 A Correct.

22 Q And again, no objections have been filed. This is just  
23 -- is it the debtors' estimate or M3's estimate, whose  
24 estimate is this?

25 A This is the estimate that M3 analysis has come up with.



1 Q How would you say M3 is doing so far in this case since  
2 the beginning in estimating administrative insolvency?

3 A Rephrase the question.

4 Q Do you think M3 has been giving accurate information to  
5 the Court on the administrative solvency or insolvency of  
6 the estate as the case has been going on?

7 A I'm not sure what we've been providing with regards to  
8 that, but any information we have provided is accurate.

9 Q Okay. Well, when the disclosure statement was filed,  
10 wasn't M3 projecting there would be a surplus of funds on  
11 hand and all of the allowed administrative claims would be  
12 paid in full and it'd go effective very quickly?

13 A You have to show me the sections in the disclosure  
14 statement that you're referring to.

15 Q You don't remember that M3 was saying in connection  
16 with the disclosure statement that there's a surplus, not a  
17 big surplus, but there was a surplus?

18 A I don't recall that particular statement, you would  
19 have to point me to that section in the disclosure statement  
20 you're referring to.

21 Q No, I'm just asking your recollection --

22 THE COURT: He's answered that question, so --

23 MR. WANDER: Okay. I'll move on, Your Honor.

24 THE COURT: -- you should move on, if you want to  
25 show him the disclosure statement, if you want to.

1 (Pause)

2 MR. WANDER: May I approach, Your Honor?

3 THE COURT: No, I have a copy.

4 (Pause)

5 BY MR. WANDER:

6 Q Showing you -- can you identify this document? It says  
7 Admin Solvency Tracker.

8 THE COURT: I'm sorry, I thought you were going to  
9 show him the disclosure statement. You're referring to some  
10 other document?

11 MR. WANDER: I believe this was in connection with  
12 the disclosure statement.

13 THE COURT: Is it part of the disclosure  
14 statement? Otherwise, you need to give it to me because I'm  
15 looking at the disclosure statement.

16 (Pause)

17 BY MR. WANDER:

18 Q Now, at the bottom left there looks like a logo for M3.

19 A Yes.

20 Q Okay. So was this document prepared by M3?

21 A Yes.

22 Q And this document is M3's estimate of administrative  
23 solvency at a certain point in time in this case, correct?

24 I see it's dated, is that June 4, 2019?

25 A Yes, that's the date, June 4, 2019.

1 Q Okay. So as of June 4, 2019 M3 was telling the Court  
2 that the estate looked to be administratively solvent by  
3 which number should I use, is it the 7 million, the 34 or  
4 the 40?

5 THE COURT: Was this document actually filed on  
6 the docket or provided to the Court?

7 MR. GENENDER: It's Exhibit C, Your Honor.

8 THE COURT: To the disclosure statement. Okay.  
9 Great.

10 MR. GENENDER: It's ECF No. 4478.

11 THE COURT: Okay. So do you remember the  
12 question?

13 THE WITNESS: I have the question, you know, I'm  
14 not the one that prepared the document.

15 BY MR. WANDER:

16 Q Well, the bottom line number it says at the bottom  
17 solvency or gap. So this is indicating the estate would be  
18 solvent, correct?

19 A This is indicating that there's 7 million of excess  
20 cash between the claims at the top of the page and the  
21 assets at the bottom of the page.

22 Q But this was M3 analyzing the financials as of June 4th  
23 and stating that the estate was administratively solvent by  
24 \$7 million, correct?

25 A Yes.

1 Q Okay. And how does that number look today? How far  
2 off was M3, a \$100 million, \$50 million?

3 A You'd have to -- I'd have to do an analysis. I didn't  
4 prepare this schedule, but the -- there's a significant  
5 number of events that have occurred since then that are  
6 impacting these numbers.

7 Q So M3's prediction when this document was filed was  
8 pretty far off, wasn't it, where we are today?

9 A The estimates are different today than they are in this  
10 schedule.

11 Q Well, when you say different today, better or worse?

12 A Worse.

13 Q And a lot worse, aren't they?

14 A If you look at one of the significant items is in  
15 Transform liabilities assumed column \$139 million. That's a  
16 significant adjustment there, a significant impact to the  
17 numbers to where we are today.

18 Q Is that the only significant impact to the numbers or  
19 are there other numbers here that seem to be off?

20 A I would have to do the analysis line-by-line.

21 Q I will not ask you to do that right now.

22 MR. WANDER: No further questions, Your Honor.

23 THE COURT: Okay. Does anyone else have any  
24 cross?

25 (No response)

1 THE COURT: Redirect?

2 MR. GENENDER: Thank you, Your Honor. Paul  
3 Genender for the debtors.

4 REDIRECT EXAMINATION

5 BY MR. GENENDER:

6 Q Mr. Murphy, the document you were just shown, can you  
7 turn to page 272 of it, which is Exhibit C to the disclosure  
8 statement of July 9th? Do you see the note 35 on that page  
9 at the bottom?

10 A Yes. Do you want me to read it?

11 Q Yes. Do you see it? Yes, please.

12 A "Preference firms still conducting diligence related to  
13 potential preference recoveries."

14 Q And on the prior page, correspondingly there's a dash  
15 there, correct?

16 A That's correct.

17 MR. GENENDER: I have no further questions.

18 THE COURT: Okay. You can step down.

19 MR. GENENDER: Your Honor, that concludes the  
20 debtors' presentation of evidence in connection with  
21 confirmation.

22 THE COURT: Okay. Does anyone have any -- do any  
23 of the objectors have any evidence that they want to  
24 introduce besides the joint exhibit book and the agreed  
25 deposition designations?

1 (No response)

2 THE COURT: No? Okay. It's 1:30. It's probably  
3 a good time to take a break, and then I'll come back and  
4 hear oral argument on the debtor's request for confirmation.

5 I just mention the deposition designations. I  
6 think unless they're quoted in your objection or in your  
7 response to objection, you should save some portion of your  
8 oral argument to tell me why they're important as opposed to  
9 just assuming that I'll divine that by looking at the  
10 deposition.

11 But why don't we come back here -- it's 1:30 now.  
12 Why don't we come back here at 2:30?

13 (Recess from 1:32 p.m. until 2:33 p.m.)

14 THE COURT: Please be seated. Okay. Good  
15 afternoon. We're back on the record in In Re: Sears  
16 Holdings Corporation.

17 MR. SCHROCK: Good afternoon, Your Honor. Ray  
18 Schrock, Weil Gotshal for the debtors.

19 Your Honor, I took the liberty of putting a  
20 presentation on the bench and with your clerk. And we'll  
21 try and keep it to the points. Of course, if you would like  
22 to direct me in any particular direction as we're moving  
23 along here, I'm happy to address anything, any questions  
24 that you may have.

25 THE COURT: Okay.

1 MR. SCHROCK: So, Your Honor, we've now concluded  
2 the evidence and, you know, we would submit that the  
3 evidence is nearly undisputed. There's no one that has  
4 really challenged the recoveries. Certainly, with regard to  
5 Mr. Transier, his testimony regarding the litigation is  
6 wholly unrefuted.

7 Regarding Mr. Griffith, no one has challenged the  
8 recoveries and what we call the sources side. Mr. Griffith,  
9 you know, testified to the sources, Mr. Murphy largely to  
10 the uses. And no one really challenged the sources side,  
11 aside from the ESL APA pick up of the 503(b)(9)s which I  
12 will discuss.

13 On the uses side, we think the Court should find  
14 Mr. Murphy's testimony extremely credible. He has been the  
15 person on the front lines dealing with these claims day to  
16 day. He knows them. It's a significant amount of work. I  
17 think the parties tried to poke holes in his testimony, but  
18 we believe that that testimony is also largely  
19 uncontroverted.

20 I will note that, of course, none of the objectors  
21 presented any evidence as to why the debtors could not  
22 satisfy the confirmation standards, but, you know, it is our  
23 burden.

24 So moving along in the deck, Your Honor, you know,  
25 we believe that the evidence has demonstrated that we will

1 be able to pay administrative expense claims. That's  
2 largely a lot of the objections that we heard, that the plan  
3 is otherwise feasible in accordance with 1129(a)(11). And  
4 we will discuss the global settlement and the -- you know,  
5 comprised of the PBGC, the plan settlement and the  
6 creditors' committee settlement and why we believe those  
7 meet the standards. And there has been uncontroverted  
8 testimony in support of those.

9 On Slide 5 we do note -- and, again, we -- I'm  
10 sure that the evidence is consistent with this, that the  
11 debtor's estimate will be about approximately 210 to 278  
12 million in outstanding claims that have to be paid on the  
13 effective date of when such claims would be allowed.

14 We believe we have about \$173 million in assets  
15 plus the proceeds from litigation. And I do want to note  
16 that no one really challenged the testimony of Mr. Griffith  
17 and the analysis that we put in to the preference  
18 litigation. I mean, that is not speculative litigation.  
19 The testimony is uncontroverted. Nobody even challenged,  
20 you know, the -- there was not one question around the  
21 amount.

22 Those litigation actions will constitute -- will  
23 come from preference actions, ESL litigation, DNO litigation  
24 coupled with the ESL litigation, which were tenants of the  
25 APA sale.



1           We are highly confident that confirming these  
2 cases at this juncture and allowing litigation to proceed,  
3 it's the best outcome that we could ask for in these cases.  
4 We've already come a long way in terms of being able to sell  
5 these assets of going concerns, frankly, against all odds.  
6 And to be able to conclude these cases, we think, in an  
7 efficient fashion is the responsible thing to do and it will  
8 also maximize recoveries and minimize claims.

9           Conversely, we think the alternative is really not  
10 a real alternative at all, conversion to Chapter 7 is likely  
11 one of the largest Chapter 7's in history and failure to  
12 confirm the plan as we meander around and allow litigation  
13 to continue to consume the valuable resources of the estate.  
14 Confirmation is the most efficient outcome and we believe  
15 should be granted.

16           On the mechanics, I want to do this for the Court,  
17 but also for the parties in interest, that to address the  
18 potential brief gap between confirmation and the effective  
19 date, we have five litigation designees that we have  
20 selected to oversee the litigation. The debtor's  
21 designee -- and this is on page 7 of the deck -- are Alan  
22 Carr and William Transier. The creditors' committee's  
23 designees are Patrick Bartels (ph), Jean Davis and Ralph  
24 Wallender (ph).

25           In the interim, those designees shall have the

1 rights and entitlements with respect to jointly asserted  
2 causes of action and any protections granted to the members  
3 of the liquidating trust board.

4 We don't know what the compensation is. I know  
5 there was some questions around that. It's not settled, but  
6 as soon as it's settled, should the Court confirm the plan,  
7 we will file -- we would file a notice for parties.  
8 1129(a)(5) requires that we, you know, disclose to the  
9 extent known.

10 THE COURT: Well, can I -- you may be getting into  
11 this, but I would like to focus on it.

12 MR. SCHROCK: Sure.

13 THE COURT: The plan is currently -- if I were to  
14 confirm the plan today --

15 MR. SCHROCK: Yes.

16 THE COURT: -- and enter the confirmation order on  
17 Tuesday --

18 MR. SCHROCK: Yes.

19 THE COURT: -- in looking at conditions precedent  
20 to the effective date, which is at page 73 of the plan, the  
21 first one is the disclosure statement order shall have been  
22 entered. Well, that's occurred.

23 MR. SCHROCK: Yes.

24 THE COURT: The plan supplement shall have been  
25 filed. And you're saying that the compensation of the

1 board, the trust board doesn't need to be in that or --

2 MR. SCHROCK: It's just not settled yet, Your  
3 Honor.

4 THE COURT: Right.

5 MR. SCHROCK: So to the extent known, but, yes, we  
6 would expect that it would be settled before we would  
7 emerge.

8 THE COURT: Okay. So that is something that would  
9 be a condition to the effective date, right?

10 MR. SCHROCK: Yes.

11 THE COURT: Confirmation order shall have been  
12 entered in satisfactory form. Definitive documents should  
13 be in form as such is reasonably acceptable. KCD shall have  
14 waived its assertion to an administrative expense. I'm  
15 going to skip F and H. I'll go to G and H. All government  
16 approvals shall have been obtained, and the carve out, as  
17 provided for by the plan, should be fully funded.

18 And then -- I mean, those could occur promptly.

19 MR. SCHROCK: Yes.

20 THE COURT: So then we have F, which says all  
21 actions, documents and agreements necessary to implement and  
22 consummate the plan shall have been effected or executed and  
23 binding.

24 So I guess it's really just the, in a way the  
25 fortuity that you don't have the compensation worked out

1 yet. But that could be worked out in a matter of days, too.

2 MR. SCHROCK: It could.

3 THE COURT: So once the plan goes effective, you  
4 have to pay all the allowed administrative expenses --

5 MR. SCHROCK: That's correct.

6 THE COURT: -- under the Code --

7 MR. SCHROCK: Correct.

8 THE COURT: -- except as otherwise agreed.

9 MR. SCHROCK: Correct.

10 THE COURT: So conceivably that -- conceivably you  
11 could go effective but for perhaps F in this list --

12 MR. SCHROCK: Yes. Correct.

13 THE COURT: -- you know, by the end of next week  
14 or the following week, a short time. But that wouldn't  
15 work. I couldn't confirm the plan if that was going to  
16 occur.

17 MR. SCHROCK: That's right, Your Honor.

18 THE COURT: So are you -- so when it says, all  
19 actions necessary to implement the plan have been  
20 effected --

21 MR. SCHROCK: Yes.

22 THE COURT: -- are you basically saying that,  
23 well, that means that we have to have the cash. Until we  
24 have the cash sufficient to pay the allowed administrative  
25 expenses and/or as they have been agreed to be paid --

1 MR. SCHROCK: Yes.

2 THE COURT: -- this means we're not going to go  
3 effective.

4 MR. SCHROCK: That's the way we read it, Judge.

5 THE COURT: Okay.

6 MR. SCHROCK: And, you know, certainly the  
7 conditions precedent are waivable. But when we've talked  
8 about this issue with the restructuring committee and how  
9 this will work, we filed many objections to administrative  
10 claims. We think we have a very good construct for, you  
11 know, frankly, incentivizing people to come into an early,  
12 earlier potential for payment and that's going to really --  
13 we think -- we actually believe that will really save a lot  
14 of money in terms of encouraging people to want to have an  
15 allowed claim to be able to share in that.

16 But, frankly, we want to make sure that we can  
17 also -- we don't want to go effective and then the moment,  
18 you know, we go effective we're not able to pay everything  
19 that we're --

20 THE COURT: Well --

21 MR. SCHROCK: -- agreeing to have.

22 THE COURT: -- I wouldn't confirm --

23 MR. SCHROCK: So we're tracking --

24 THE COURT: -- the plan if I knew you were going  
25 to go effective next week --

1 MR. SCHROCK: Yes. Yes.

2 THE COURT: -- because I couldn't.

3 MR. SCHROCK: Yes. Yes. So we're --

4 THE COURT: So --

5 MR. SCHROCK: -- we're definitely very mindful of  
6 that. And the restructuring committee, in fact, when we,  
7 you know, last met just a couple of days ago said that they  
8 wanted to -- you know, they're still -- they are a very  
9 diligent group. They want to go effective as soon as  
10 possible. I think everybody does. But they're really  
11 pressing people. They're pressing the preference firms, you  
12 know, making sure that there's going to be those complaints  
13 filed --

14 THE COURT: Right.

15 MR. SCHROCK: -- in the very near term. And  
16 they're pressing us on the objections, and they pressed us  
17 to -- you know, on the admin claim consent program. They  
18 want to go effective as soon as possible. We think that we  
19 can go effective within a few months, as early as, you know,  
20 within a few months. But we're mindful that we're not going  
21 to sit here in Chapter 11 waiting for an effective date to  
22 occur for an extended period of time. That --

23 THE COURT: So how --

24 MR. SCHROCK: -- doesn't help anyone.

25 THE COURT: And I understand that. The Code, as I

1 read it, but I'm happy to hear objectors on this, doesn't  
2 put an outside date on going effective.

3 MR. SCHROCK: We noticed that, Your Honor.

4 THE COURT: Well, and it -- that's consistent with  
5 many plans, particularly plans that require third party  
6 approvals --

7 MR. SCHROCK: Right.

8 THE COURT: -- late approvals, approvals by boards  
9 to close transactions, approval by State AG's offices for  
10 transfers of non-profit property, and all sorts of things  
11 like that. Courts have nevertheless confirmed plans knowing  
12 that that process might be several months long.

13 At the same time, I think Courts have a natural  
14 reluctance just to have an open-ended period --

15 MR. SCHROCK: Uh-huh.

16 THE COURT: -- for those types of things to occur.  
17 There's no real limitation on that here.

18 MR. SCHROCK: Uh-huh. Would --

19 THE COURT: And it -- I mean, other than one that  
20 I might impose. But --

21 MR. SCHROCK: We --

22 THE COURT: -- there's nothing in the plan that  
23 puts a limit on that.

24 MR. SCHROCK: Yeah. We're sensitive to that, Your  
25 Honor, and we thought that your -- you may suggest that we

1 check in, frankly, once a quarter or once every, you know,  
2 some --

3 THE COURT: With a progress report on getting --

4 MR. SCHROCK: Yeah, a progress report on how are  
5 we doing toward -- because we want people to know what --  
6 you know, we're going to make reporting. But we want people  
7 to know what kind of progress are we making, what kind of  
8 claims are outstanding, are we, you know, in fact, you know,  
9 progressing toward the effective date. And, you know, and  
10 that's something that, you know, Mr. Dublin, in fact,  
11 suggested as a way to have a nice check on the process to  
12 ensure that, you know, everybody's doing their job and  
13 we're, in fact, moving expeditiously towards emergence.

14 THE COURT: Okay. Well, I just wanted to raise  
15 the issue so that everyone could be focusing on it. And I  
16 wanted to make sure I was reading the plan you were, that  
17 this provision, 14.1 --

18 MR. SCHROCK: Yes.

19 THE COURT: -- really does -- I mean, it is kind  
20 of tautological. But you don't get to the effective date  
21 until you can achieve the effective date without the plan  
22 collapsing.

23 MR. SCHROCK: Right.

24 THE COURT: Okay.

25 MR. SCHROCK: All right.



1 THE COURT: So, anyway, you were starting to go  
2 into the mechanics of the --

3 MR. SCHROCK: Yes. Towards the interim mechanics  
4 that --

5 THE COURT: Right.

6 MR. SCHROCK: -- that those parties will be there.  
7 So we will have one that, you know, is really the  
8 restructuring subcommittee --

9 THE COURT: Well, can I interrupt you again, then?

10 MR. SCHROCK: Of course. Anytime.

11 THE COURT: If I confirm the plan --

12 MR. SCHROCK: Yes.

13 THE COURT: -- it doesn't yet go effective.

14 MR. SCHROCK: Yes.

15 THE COURT: So who -- the liquidation trust isn't  
16 in effect yet. It's still the estate. So that's why you  
17 have the litigation designees.

18 MR. SCHROCK: That's correct, Your Honor. So the  
19 litigation designees we are granting standing and allowing,  
20 you know, allowing that litigation to progress. The  
21 restructuring committee would still oversee the  
22 administration of the estates until the effective date.

23 THE COURT: All right. Okay.

24 MR. SCHROCK: With the -- of course as we'll get  
25 to, with the administrative consent program we propose to

1 appoint, you know, as another member effectively to serve  
2 alongside the restructuring committee and to ensure that  
3 we're making progress, assist with the reconciliation of the  
4 claims, and to really give them a voice to make sure that  
5 we're -- they're getting the benefit of --

6 THE COURT: So on that point, and I appreciate  
7 that the parties have been working on this sort of around  
8 the clock. But that person --

9 MR. SCHROCK: Uh-huh.

10 THE COURT: -- how is he or she selected? There's  
11 a suggestion that it's a vote, but I can't see how you would  
12 do the vote. How is it -- how are they selected?

13 MR. SCHROCK: That's a great question, Your Honor.  
14 We left it to the admin -- to the ad hoc group --

15 THE COURT: Okay.

16 MR. SCHROCK: -- frankly, to make the selection.  
17 They were the ones who negotiated the transaction and I  
18 imagine they will talk to -- they'll talk to their fellow  
19 administrative claimants and come up with a person.

20 THE COURT: Okay. So there's a minimum 17-day --

21 MR. SCHROCK: Correct.

22 THE COURT: -- period to opt in.

23 MR. SCHROCK: Correct.

24 THE COURT: So I guess maybe they would look at  
25 who opt in, who opts in and then poll those folks as to who

1 would be the --

2 MR. SCHROCK: That's right.

3 THE COURT: -- who would be the designee. Someone  
4 is nodding in the background. Is that on behalf of the ad  
5 hoc group? That's --

6 MR. SCHROCK: Yes. Ms. --

7 THE COURT: -- that's what you were thinking of?

8 MR. SCHROCK: Ms. Morabito.

9 THE COURT: Okay.

10 MR. SCHROCK: Okay. That reminds me that during  
11 the break I can confirm that Tannor Capital Advisors, LLC,  
12 which is Number 3 in the objectants, are at ECF 4673 --

13 THE COURT: Right.

14 MR. SCHROCK: They've agreed to withdraw their  
15 objection and they're going to be an opt-in party to the  
16 administrative claims consent program.

17 THE COURT: Okay.

18 MR. SCHROCK: So the Court can confirm the plan.

19 THE COURT: All right. Someone is standing up  
20 behind you to perhaps confirm that.

21 MS. NESTER: Good afternoon, Your Honor. Minta  
22 Nester, Togut, Segal & Segal, counsel for Tannor. I just  
23 wanted to confirm what counsel has said; that, yes, provided  
24 that the term sheet is approved as is or with no material  
25 modifications that would impact Mr. Tannor's claims, we

1 would be prepared to opt in and, in connection with that,  
2 withdraw the confirmation objection.

3 THE COURT: Okay. Thank you.

4 MR. SCHROCK: Sorry about that. Forgot to do that  
5 for --

6 (Pause)

7 MR. SCHROCK: Your Honor, just quickly I would  
8 like to talk about the global settlement and what the  
9 standard is and what some of the benefits of it are. It's  
10 on Slide 10.

11 You know, we're talking about something that must  
12 fall within the lowest point in the range of reasonableness.  
13 The global settlement is compromised of the PBGC settlement,  
14 the creditors' committee settlement, and the plan  
15 settlement.

16 The plan settlement, which I note nobody has  
17 frankly challenged on the evidence, is a settlement, a  
18 substantive consolidation rather than a substantive  
19 consolidation of the debtors. This is a settlement that's  
20 in line with other settlements of this issue in this and  
21 other circuits.

22 And what Mr. Murphy's testimony really elucidated  
23 was that we tried to -- you know, when you went back and  
24 really saw how long is this going to take to reconcile all  
25 of these claims and how would it be possible, compounded by

1 the fact that you have to get -- transform to allow us to do  
2 this, you know, they're still an operating enterprise and  
3 have us be able to do this, it really -- we never like to  
4 say it was borderline impossible, but it certainly was  
5 getting there.

6 And, you know, we all believed, I think, the  
7 creditors' committee, the debtors, that it would be a  
8 massive waste of resources to be able to do that. And  
9 that's what really gave rise to, you know, in part the  
10 discussions with the PBGC settlement that we outline on page  
11 12.

12 And the key terms of that -- and, you know, we  
13 haven't talked about it in a long time, but the -- you know,  
14 they are the largest creditor in these estates. They  
15 receive one consolidated \$800 million allowed general  
16 unsecured claim in satisfaction of approximately \$1.4  
17 billion in general unsecured claims that could be asserted  
18 by the PBGC at each debtor.

19 The PBGC receives a liquidating trust priority  
20 interest consisting of the first 97.5 million in net  
21 proceeds, you know, after satisfaction in full of senior  
22 claims, specified causes of action and other causes of  
23 action, namely preference claims.

24 They have and agreed to vote in favor of the plan  
25 and a consensual termination of the pension plans. They're

1 also assisting with the KCD waiver, and there's a mutual  
2 release provision.

3 The benefits are outlined on Slide 13. We think  
4 that it's really beyond dispute that that settlement is a  
5 key aspect of the plan and something that we believe is in  
6 all parties' interests.

7 THE COURT: Okay. Just to -- their priority  
8 interest is as an unsecured creditor.

9 MR. SCHROCK: That's correct. So, yes, as an  
10 unsecured creditor. That's correct.

11 THE COURT: Right. So the --

12 MR. SCHROCK: So it's not a priority --

13 THE COURT: -- the admins come before.

14 MR. SCHROCK: Yes, they do.

15 THE COURT: Right.

16 MR. SCHROCK: Yes, they do.

17 THE COURT: Okay. I saw some --

18 MR. SCHROCK: We were careful to note that.

19 THE COURT: I saw some expense lawyers looking  
20 around frantically on that.

21 MR. SCHROCK: Yes. No. The PBGC is not jumping  
22 in front of the administrative claims.

23 THE COURT: Okay.

24 MR. SCHROCK: That's correct.

25 The plan settlement which we've, you know, already

1 discussed in part is outlined in the briefing. Unless Your  
2 Honor has, you know, specific questions around the plan  
3 settlement I'm going to, you know, forego, you know, an  
4 explicit presentation on those topics.

5 THE COURT: Well, the plan settlement is really  
6 part of the --

7 MR. SCHROCK: The settlement of substantive  
8 consolidation.

9 THE COURT: Yeah. It's all -- it's really all  
10 interlinked.

11 MR. SCHROCK: It is.

12 THE COURT: You have the --

13 MR. SCHROCK: It is all interlinked.

14 THE COURT: -- PBGC settlement, the so-called plan  
15 settlement, which is the plan substantive consolidation that  
16 adjusts certain recoveries in light of the perceived  
17 unfairness of just having a flat substantive consolidation,  
18 and finally mechanisms for dealing with the liquidating  
19 trust.

20 MR. SCHROCK: That's correct, Your Honor. They  
21 all build on one another. You know, it's that the plan  
22 settlement was the starting point, you know, coupled with  
23 the PBGC settlement, it's provided the basis for the  
24 unsecured creditors' committee settlement.

25 THE COURT: Okay.

1 MR. SCHROCK: Mr. Murphy gave undisputed testimony  
2 around the benefits of the plan settlement. We think that,  
3 you know, there's really nothing on the record to say  
4 otherwise. We've gone through some of the, you know, some  
5 of the real monetary benefits. But without that initial  
6 settlement, the plan settlement, without the PBGC settlement  
7 we wouldn't be before Your Honor seeking confirmation of the  
8 plan today. And we are grateful that they decided to  
9 support the estate, both at the APA hearing and now here at  
10 the plan because they really did provide us a pathway to get  
11 these cases concluded, should Your Honor confirm the plan.

12 The creditors' committee settlement, which came to  
13 this summer, they've agreed to support the plan including  
14 the PBGC settlement. And on page 20 we talk about that  
15 issues regarding post-effective date governance, which have  
16 all been settled now, as well as the creditors' committee  
17 settlement will have been -- provided certain consent  
18 rights.

19 Now we've walked through in the briefing all the  
20 9019 standards around these various settlements, but I think  
21 that since the debtors and the creditors' committee have  
22 come to peace, you know, we have been, you know, kind of  
23 single minded in terms of prosecuting the plan and trying to  
24 get these cases to conclusion, but it has not been easy.  
25 They have been a good partner.



1           1129(a)(9), which has gotten a lot of focus, you  
2       know, provides for persons holding allowed claims, the type  
3       of priority under 507(a) to receive specified cash payments.  
4       The plan provides for full payment of all those allowed  
5       security and priority claims. We did have an objection  
6       talking about the requirement of a secured creditor. They  
7       want a cash reserve as of the confirmation date,  
8       effectively.

9           And, Your Honor, we are not going to go effective  
10      without paying our secured claims. There was certainly no  
11      reserve that was put in place prior to this point. We've  
12      got a mechanism through the administrative claims consent  
13      program to bring people in to get earlier payment. We don't  
14      think that there's a requirement that while you're still in  
15      Chapter 11 and prior to the effective date that we have to  
16      put up a cash reserve. It's the debtors' cash. We're  
17      paying administrative claims. We're moving forward. But at  
18      the time of emergence, we will have the \$19 million actually  
19      reserved and we don't have an issue doing that.

20           THE COURT: Well, I'm sorry. There are two  
21      different -- I think there are two different issues there.  
22      There's the issue of reserves for administrative  
23      expenses --

24           MR. SCHROCK: Uh-huh.

25           THE COURT: -- which, to me, is more of an issue

1 of feasibility than a legal requirement to provide a  
2 reserve. But you did have an objection by at least one  
3 creditor that I believe was given a replacement lien or a  
4 lien?

5 MR. SCHROCK: Correct.

6 THE COURT: And I think their rights may be  
7 different in that the lien has to be protected. It may not  
8 need to be a cash reserve, but I think you need to protect  
9 the lien --

10 MR. SCHROCK: Okay.

11 THE COURT: -- under the --

12 MR. SCHROCK: We could --

13 THE COURT: -- well, either -- under --

14 MR. SCHROCK: You're saying come up with  
15 another --

16 THE COURT: -- under 362 --

17 MR. SCHROCK: -- form of security.

18 THE COURT: -- under 362(d)(1) ultimately and 361.  
19 This is the Mr. Ireland --

20 MR. SCHROCK: Yes. That's right.

21 THE COURT: -- and the U.S.

22 MR. SCHROCK: That's right.

23 THE COURT: So --

24 MR. SCHROCK: We can certainly, I think --

25 THE COURT: I mean, there are a lot of --

1 MR. SCHROCK: There are a lot of different ways to  
2 do it.

3 THE COURT: Well, free assets, you know.

4 MR. SCHROCK: Yes.

5 THE COURT: So I see that. But I think there's a  
6 separate adequate protection obligation there.

7 MR. SCHROCK: Okay.

8 THE COURT: Or if there isn't right there, there  
9 would be as soon as they move to lift the stay, so.

10 MR. SCHROCK: Understood.

11 So with that, Your Honor, let us huddle after I  
12 sit down and we'll talk about, you know, how we're going to  
13 address that. But I'm --

14 THE COURT: Okay.

15 MR. SCHROCK: -- I'm not surprised to hear you say  
16 that.

17 Now in terms of the estimate of claims to be  
18 satisfied, you know, there was quite a bit of, you know,  
19 back and forth with Mr. Wander over, you know, the number of  
20 proofs of claims and which have been objected at this very  
21 point. Like any complex Chapter 11 case, we have 23,000  
22 proofs of claim that have been filed. To say that we've  
23 reconciled every single proof of claim would not be true.

24 We have certainly done everything we can up to  
25 this point to have -- and, you know, the restructuring

1 committee has demanded it, that we were, you know, careful  
2 about where we were on admin solvency throughout these  
3 cases. This is the first, you know, one of the first cases  
4 certainly where I've, you know, been kind of hammering on  
5 that issue from, really from the first day of the case and  
6 we set up the wind down accounts.

7 But when you take into account the claims  
8 reconciliation process and the objections' process, the  
9 standing amount of the claims required to be paid on the  
10 effective date is approximately \$86 million, which we  
11 believe because you if you look at the 503(b)(9)'s -- and I  
12 know parties can argue, well, geez, there's still some  
13 litigation outstanding on the 503(b)(9)'s. It's undeniable  
14 there is an APA contractual provision that says they have to  
15 pay it. Okay. If there's something that parties want to  
16 put into evidence to say why that's a bad -- that's a bad  
17 assumption, right now we have a court-approved order coupled  
18 with, you know, the requirement for them to pay the  
19 503(b)(9) claims.

20 There's 50 million other administrative claims and  
21 18 million in priority (indiscernible) claims, 18 million in  
22 secured claims.

23 THE COURT: And 3 million of other priority, I  
24 guess.

25 MR. SCHROCK: That's right. Three million of

1 other priority claims, that's right, with the settlement in  
2 particular.

3 But, you know, we felt as a team and with the  
4 restructuring committee that this was not a case where we  
5 needed to file an administrative claims bar date. When you  
6 actually sold all the assets in February and, you know, you  
7 have the accounts payable, you have the records, an  
8 administrative claims bar date, in our judgment, was simply  
9 going to generate a bunch of claims that we would then have  
10 to object to and deal with over the course of the next  
11 several months.

12 So it was, in fact, a very deliberate effort I  
13 would say --

14 THE COURT: Well, let me just follow through on  
15 that.

16 MR. SCHROCK: Sure.

17 THE COURT: Mr. Murphy had in his administrative  
18 expense claims estimate chart \$30 million just based on the  
19 accounts payable.

20 MR. SCHROCK: Yes.

21 THE COURT: It's certainly conceivable to me that  
22 a fairly large portion of that involves amounts payable  
23 where there hasn't yet been an administrative expense motion  
24 or claim filed.

25 So how would the debtors deal with that? Would

1 they just ignore it or would they -- are they going to make  
2 them payable if -- you know, depending on whether someone  
3 opts in?

4 Well, first of all, would they get notice of the  
5 opt in, just if they have filed a claim, if they just are on  
6 the payables list?

7 MR. SCHROCK: Yes. To the extent we would be --  
8 we're giving specific notice to all known creditors.

9 THE COURT: So that would include not only those  
10 who file claims, but who are listed on the accounts payable  
11 of the book --

12 MR. SCHROCK: Yes.

13 THE COURT: -- on the books and records?

14 MR. SCHROCK: Yes.

15 THE COURT: So then let's assume that they don't  
16 opt in.

17 MR. SCHROCK: Yes.

18 THE COURT: As I under -- and you're going to  
19 explain this later, but as I understand that consent  
20 program, they get treated as an administrative expense  
21 creditor, but they don't have the right to certain dollars  
22 out first. They will get paid in full --

23 MR. SCHROCK: Yes.

24 THE COURT: -- on the effective date. Does that  
25 include those who don't file an administrative expense

1 motion, who just appear on the debtors' books and records as  
2 having an account payable?

3 MR. SCHROCK: Well, they are certainly going to --  
4 it's a fair point. They are certainly going to have to --  
5 we're not going to go looking for people to pay on  
6 administrative expense claims. We are -- we have estimated,  
7 you know, what we think is payable.

8 THE COURT: Right.

9 MR. SCHROCK: If parties --

10 THE COURT: No. But what I'm saying, if you -- if  
11 they're on your account payables list --

12 MR. SCHROCK: Yes. If we think we owe them, yes,  
13 then they're --

14 THE COURT: Then you'll pay them.

15 MR. SCHROCK: -- they're going to get paid.

16 THE COURT: Okay.

17 MR. SCHROCK: Absolutely.

18 THE COURT: All right.

19 MR. SCHROCK: Yes. If they're -- if we believe we  
20 owe them, we have a record of it and we're liable for it  
21 under the terms of the APA, we're going to be, you know --

22 THE COURT: And there's nothing to stop anyone  
23 from -- who has done business with Sears or fallen down in a  
24 Sears store to call up Sears and say, am I on your accounts  
25 payable lists. And if you say no, then they can file an

1 administrative expense at least up through the effective  
2 date.

3 MR. SCHROCK: Certainly. Up through the effective  
4 date. Yes, Your Honor.

5 THE COURT: Okay. So I'm not troubled by the lack  
6 of an administrative claims bar date then because you don't  
7 -- I don't see how you -- why you would necessarily need  
8 one.

9 MR. SCHROCK: Yeah. Our judgment was that it  
10 would simply generate a lot of claims reconciliation work.

11 THE COURT: I mean, oddly the fact that there is a  
12 delayed effective date --

13 MR. SCHROCK: Right.

14 THE COURT: -- argues for not having to do it.  
15 You would -- if you were going to go effective tomorrow, I  
16 would be wondering why you hadn't done it because the cash  
17 might all be gone.

18 MR. SCHROCK: Right. But -- and, Your Honor, when  
19 -- especially here where we sold all of the assets primarily  
20 other than the remnant assets in --

21 THE COURT: Well, there's no ongoing --

22 MR. SCHROCK: Yeah. There's no ongoing  
23 enterprise.

24 THE COURT: -- accrual. Right.

25 MR. SCHROCK: Your Honor, we talked and went



1 through the estimate of available funds. I don't think that  
2 those are really in dispute as I highlighted earlier. I hit  
3 the preference actions, which, you know, we're hopeful that  
4 those will be even larger than what we put the estimates on.  
5 But, you know, these are -- we undertook, we set the  
6 preference firms to say, listen, what can we count on, what  
7 can we do.

8 And we had, you know, Mr. Griffith tested against  
9 other cases. We think that that evidence is, you know,  
10 valuable to the Court in showing that it's not speculative  
11 around the preference proceeds.

12 We highlight some of his testimony on pages -- on  
13 page 28. And I want to note and make clear that although we  
14 do think the ESL litigation proceeds will be significant,  
15 we're not counting on ESL litigation proceeds, you know, to  
16 go effective. I want to be clear on that. This -- you  
17 know, when you run through the numbers, when you run through  
18 the claims reconciliation, you know, we're -- if that comes  
19 in, great, but it's certainly not a requirement in order to  
20 go effective. And the math, you know, in the declaration  
21 certainly bears that out.

22 Just let me hit on the administrative consent  
23 program for a few minutes and I'm going to ask --

24 THE COURT: Well, can I go back, I'm sorry, to the  
25 available funds?

1 MR. SCHROCK: Yeah.

2 THE COURT: In looking at the summary of available  
3 funds --

4 MR. SCHROCK: Yeah.

5 THE COURT: -- in Mr. Griffith's declaration --

6 MR. SCHROCK: Uh-huh.

7 THE COURT: -- that was before I ruled on the cash  
8 in transit.

9 MR. SCHROCK: You're talking about that was in  
10 Exhibit C to the disclosure statement?

11 THE COURT: No. His declaration.

12 MR. SCHROCK: Yeah. Okay.

13 THE COURT: I don't -- he -- there's -- I think it  
14 was fairly recently I ruled that 22 and a half million  
15 dollars suspended was the debtors' property under the APA.  
16 How is that taken into account in that chart?

17 MR. SCHROCK: Hold on just a second.

18 THE COURT: Are the debtors already holding that  
19 money and, therefore, it's not -- you know, it's already in  
20 the cash position and --

21 MR. SCHROCK: I believe that's right, Your Honor,  
22 that we are --

23 THE COURT: -- ESL was just wanting it back?

24 MR. SCHROCK: That's right. It wasn't something  
25 we had to give back.

1 THE COURT: But were you counting it? I couldn't  
2 tell whether --

3 MR. SCHROCK: Yeah.

4 THE COURT: -- that was being counted.

5 MR. SCHROCK: Yes. I believe -- it is counted, I  
6 believe, on the cash on hand.

7 (Pause)

8 MR. SINGH: Your Honor, Sunny Singh on behalf of  
9 the debtors. Just one clarification. The cash in transit  
10 is not included in the cash on hand. So we do have the  
11 \$50.1 million.

12 THE COURT: Separate from that.

13 MR. SINGH: Right, separate and apart. The 22 and  
14 a half, really the argument around that was ESL had an  
15 argument that -- against -- excuse me -- Transform, that the  
16 166 that Your Honor -- remember the 166 issue, that there's  
17 -- you know, they have an obligation to pay those payables,  
18 that the 22 and a half was a deduct to that which Your Honor  
19 ruled against. So it was not incremental cash. It was  
20 related to the deduct portion.

21 THE COURT: But who has the money?

22 MR. SINGH: They have the cash, right, because  
23 they have our bank account. So they have that 22.1.

24 THE COURT: But you're entitled to it.

25 MR. SINGH: Well, that's the issue of dispute, I

1 think, that's --

2 THE COURT: No. I already ruled on that.

3 MR. SINGH: No. Once -- it's subject to the  
4 reconciliation, right, and you've ruled on the portion that  
5 -- you ruled on the portion that it's not a deduct and it's  
6 subject to the reconciliation of what we're owed versus what  
7 they're owed.

8 THE COURT: That's on the other open issues.

9 MR. SINGH: That's correct. This -- yeah. So  
10 that's -- I'm sorry.

11 THE COURT: All right.

12 MR. SINGH: We'll try --

13 THE COURT: Just --

14 MR. SINGH: -- maybe --

15 THE COURT: No one mentioned it, so I wanted to  
16 make sure how it factors in.

17 MR. SCHROCK: Yeah. I mean --

18 THE COURT: And there was discussion, for example,  
19 that there's, you know, a ten to \$15 million estimated high  
20 and low on the receivables and prepaid inventory issues,  
21 which brought the 139 down to 99, but it could lower than --  
22 90, but it could go lower than that. But was -- I guess my  
23 question was, would it go lower after application of the 22  
24 some million or is that, you know, something that would be  
25 set off first before you reduce the, you know, the rest of

1 the 139 for the 503(b)(9) claims?

2 MR. FRIEDMANN: Yeah. It's an additional  
3 incremental money -- it's an amount that's still out there.  
4 So it's one of the three issues that Your Honor deferred to  
5 be examine -- that go to an examiner was this idea that  
6 there was a cash in transit along with other --

7 THE COURT: Right.

8 MR. FRIEDMANN: -- monies that we believe --

9 THE COURT: Well, but I didn't need the --

10 MR. FRIEDMANN: -- belong to the estate.

11 THE COURT: -- examiner on cash in transit. I  
12 ruled on that one.

13 MR. FRIEDMANN: Well, the issue I think is that  
14 they've argued that that should be offset against other  
15 items.

16 THE COURT: Well, but they were first arguing that  
17 they got it and now they don't. So --

18 MR. FRIEDMANN: Right. I mean --

19 THE COURT: -- I mean, it's -- that's fine to have  
20 it be offset, but it's not being -- in other words, there  
21 was testimony by Mr. Griffith that his estimates of the  
22 available funds included \$90 million for 503(b)(9) claims,  
23 and there's some back and forth about whether that should be  
24 further reduced because of the accounts receivable prepaid  
25 inventory disputes.

1 MR. FRIEDMANN: Correct.

2 THE COURT: But would also, I guess, either there  
3 or because the money is fundable somewhere else be increased  
4 by the 22 and a half million?

5 MR. FRIEDMANN: Yeah. The answer is yes. So  
6 there --

7 THE COURT: All right.

8 MR. FRIEDMANN: -- would be additional money  
9 available to the estate in the event --

10 THE COURT: Right.

11 MR. FRIEDMANN: -- that the examiner looked at the  
12 -- has also included the checks that were written pre-  
13 closing that got cash on the books post-closing and vice  
14 versa. So, yeah, there's all the issues with the  
15 reconciliation of the offsets which would be incremental in  
16 addition to the money we currently have on hand that right  
17 now is --

18 THE COURT: Right. But I've already decided that  
19 one issue. You don't need anyone else to decide it except  
20 maybe on appeal. I've decided that issue on the 22 and a  
21 half million.

22 MR. O'NEAL: And, Your Honor, Sean O'Neal for  
23 Transform. I think Mr. Singh was correct. I think that  
24 cash in transit issue related to the 166 and also related to  
25 the DIP shortfall amount. And what we're in discussions now

1 with the debtors and we've got proposed orders going back  
2 and forth is to have an expert or an examiner --

3 THE COURT: Well, that's --

4 MR. O'NEAL: -- look at the reconciliation.

5 THE COURT: -- that's fine. I understand they are  
6 open issues.

7 MR. O'NEAL: Certainly.

8 THE COURT: I just wanted to just fix on the  
9 record that that issue, the cash in transit issue, isn't  
10 open anymore. It's something that Transform may be able to  
11 set off against --

12 MR. O'NEAL: Correct, Your Honor.

13 THE COURT: -- but the testimony, I guess, may  
14 well have indicated that there wasn't anything to set that  
15 off against except for the 90 million that --

16 MR. O'NEAL: And, Your Honor, there's a --

17 THE COURT: -- the debtor was assuming would go to  
18 503(b)(9) claims.

19 MR. O'NEAL: And there's a disagreement. And we  
20 didn't actually engage on the \$97 million issue because I  
21 think they -- the debtors have been clear in their  
22 declarations that they're not counting on that money for  
23 purposes of the effective date. So --

24 THE COURT: Okay.

25 MR. O'NEAL: -- we didn't feel the need to

1 challenge that.

2 THE COURT: All right. Okay.

3 MR. SINGH: Your Honor, the other thing I would  
4 just point out, in Mr. Griffith's declaration, paragraph 73,  
5 he walks through the impact and, basically, for purposes of  
6 the numbers that are in his declaration or Mr. Schrock has  
7 reviewed the 50 million, we've just ignored, you know, for  
8 example, what's coming in from Transform in respect with  
9 those disputes.

10 THE COURT: No. I understand. But --

11 MR. SINGH: Yeah.

12 THE COURT: -- one of those disputes has been  
13 resolved.

14 MR. SINGH: Yes.

15 THE COURT: So there was no reason to ignore that  
16 one.

17 MR. SINGH: Well, it was a timing issue. When he  
18 filed the declaration --

19 THE COURT: I understand. I'm saying --

20 MR. SINGH: Yeah. And now we can --

21 THE COURT: -- today there's no reason to --

22 MR. SINGH: -- I think take into account --

23 THE COURT: -- ignore it.

24 MR. SINGH: -- that we have additional --

25 THE COURT: Right.



1 MR. SINGH: -- money subject to the reconciliation  
2 -- subject to their --

3 THE COURT: Okay.

4 MR. SINGH: -- offset on this.

5 THE COURT: All right. Okay. All right.

6 MR. SCHROCK: All right. I think that's clear.

7 Your Honor, on the administrative expense claims  
8 consent program, and I should first note we did present  
9 evidence and we believe we don't need the administrative  
10 expense claim consent program in order to go effective. Our  
11 agreement with the ad hoc group is, however, is that if for  
12 whatever reason Your Honor wasn't inclined to allow us to  
13 implement that program, that they've kind of put their  
14 swords down and agreed to support confirmation, they would  
15 want to be able to raise those issues. And we said, if that  
16 happens, we don't think it's going to happen, but if it  
17 happens we'll agree to adjourn it.

18 So I just wanted to note that for the record.

19 THE COURT: Okay.

20 MR. SCHROCK: Although we are -- you know, we do  
21 believe the evidence supports approving the plan without  
22 that program. I think that they certainly wanted to make  
23 sure that I mentioned that.

24 This program -- this was a difficult thing to put  
25 together. We had a lot of competing groups that wanted a

1 dialogue with the debtors. We chose the largest group. I  
2 think the fact that they may have --

3 THE COURT: In dollar amount?

4 MR. SCHROCK: Yes, in terms of dollar amount. And  
5 they were a manageable group, you know, for us to be able to  
6 deal with. There were three primary clients. You know,  
7 trying to deal with, you know, 50 creditors, it's just like  
8 dealing with a bondholder group. You know, you have to have  
9 a steering committee of some sort to -- in order to get  
10 traction.

11 I do believe that those parties will ultimately,  
12 you know, come into the program should Your Honor approve  
13 the confirmation of the plan. But we really think that this  
14 was nothing but upside for the estate and provides a very  
15 good incentive for parties to come into it.

16 So, you know, broadly speaking, this plan will  
17 have, you know, parties who affirmatively opt in or do not  
18 opt out because of the settled claims, will receive a max  
19 recovery of 75 percent of the allowed amount of their  
20 claims. So each holder of an allowed admin claim that opts  
21 in, then the 17 days after entry of the confirmation order  
22 shall receive a pro rata share of 20 million on or about  
23 December 1st, 2019 and consensual resolution of that amount  
24 within 30 days from the date of the receipt of the opt in  
25 form.

1 THE COURT: Well, can we --

2 MR. SCHROCK: Yes.

3 THE COURT: -- stop on that point?

4 MR. SCHROCK: Sure.

5 THE COURT: I want to make sure I understand. If  
6 you opt in, in addition to getting your pro rata share of  
7 the 20 million capped at a 75 percent recovery, how is your  
8 -- how is the amount of your claim treated? Is it deemed  
9 allowed? I didn't think it was.

10 MR. SCHROCK: Yeah. We --

11 THE COURT: I thought I heard you say that your  
12 claim would be allowed in 30 days and I didn't follow that.

13 MR. SCHROCK: I think we have to work with them to  
14 --

15 THE COURT: To go over the merits of the claim.

16 MR. SCHROCK: -- to go over the merits of the  
17 claim.

18 THE COURT: All right.

19 MR. SCHROCK: And then we consensually agree on  
20 the amount. And so when Mr. Wander was --

21 THE COURT: Well, but what if you -- but if you  
22 don't -- but if you don't consensually agree, then it's left  
23 up to the Court? That's how I would look at it.

24 MR. SCHROCK: Yeah. I believe yes, Your Honor,  
25 that, you know, 30 days --

1 THE COURT: But there's a real effort to try to --

2 MR. SCHROCK: Yes.

3 THE COURT: -- to sit down and go through the  
4 numbers and --

5 MR. SCHROCK: And we think that --

6 THE COURT: -- agree on what makes sense and agree  
7 to disagree on what doesn't make sense.

8 MR. SCHROCK: Yeah. And I think that's what's  
9 going to save -- when we talk about the significant  
10 litigation expense, parties who want to get paid quicker --  
11 and we are, you know, we're going to be very reasonable in  
12 terms of sitting down, especially for parties who are  
13 coming, you know, coming in to the settlement. Sometimes  
14 there's preference recovery and we have to balance, you  
15 know, those issues where you have to look at, can we -- you  
16 know, how is it going to effect the ultimate recovery to the  
17 estates. And so we won't be able to reach an agreement on  
18 every single instance.

19 But there's going to be a real effort here to try  
20 and get those claims consensually resolved. We're  
21 contemplating hiring a smaller firm, not Weil Gotshal, to do  
22 the, you know, administrative claims reconciliation. We  
23 will, you know, be happy to assist because we know a lot  
24 about the company and have been working there. But we think  
25 it would be more cost effective to have a different firm

1 assist with some of those negotiations.

2 THE COURT: And when you refer to administrative  
3 claims reconciliation, there's obviously been a fair amount  
4 of work done already --

5 MR. SCHROCK: Yes.

6 THE COURT: -- on the claims, particularly the  
7 larger ones.

8 MR. SCHROCK: Yes.

9 THE COURT: So the reconciliation is more sitting  
10 down with your sleeves rolled up and talking to the other  
11 side and going through the numbers?

12 MR. SCHROCK: Going through the numbers, having  
13 preference counsel, you know, involved to the extent that,  
14 you know, because there's a -- you know, there's a waiver  
15 that would be contemplated. So you have to look at that  
16 side of it as well.

17 THE COURT: Okay.

18 MR. SCHROCK: But, you know, we're organized. You  
19 know, we're prepared to do it.

20 THE COURT: So it's not starting from scratch.  
21 It's building on --

22 MR. SCHROCK: No.

23 THE COURT: -- the work that Mr. Murphy and his  
24 group --

25 MR. SCHROCK: Yes.

1 THE COURT: -- has been doing.

2 MR. SCHROCK: And Mr. Murphy and his group,  
3 they -- I mean, they really do know the claims. They're  
4 living with them every day.

5 For parties who don't timely opt out, but don't  
6 opt in, they are going to receive their pro rata share of  
7 the second distribution basically to catch them up. And  
8 then of course parties who don't want to be part of the  
9 settlement, they can just opt out. They'll get paid 100  
10 cents, you know, on the effective date, the later of  
11 effective date and when their claim is actually allowed.

12 THE COURT: So can I interrupt you again?

13 MR. SCHROCK: Of course.

14 THE COURT: This is a -- what is the rationale  
15 behind that middle group or having that middle group? I  
16 mean, it's -- you know, opting in you check a box.

17 MR. SCHROCK: Right.

18 THE COURT: Opting out you check a box. The  
19 middle group doesn't do anything.

20 MR. SCHROCK: The middle group --

21 THE COURT: Why --

22 MR. SCHROCK: -- we were --

23 THE COURT: Why have them?

24 MR. SCHROCK: So we were sensitive to, you know,  
25 discriminatory treatment issues. If you're going to deem

1 somebody to consent effectively by not taking an action to  
2 affirmatively opt out, that we wanted to make sure that  
3 those parties, you know, basically, you know, could still  
4 participate, you know, in the settlement itself. And we  
5 thought that, you know, requiring an affirmative act, much  
6 like on a ballad to actually, you know, get out of this --  
7 get out of the consent program was a fair way to deal  
8 with --

9 THE COURT: Yeah. But why put them -- why have a  
10 third group? Why not just have opt ins and opt outs? I'm  
11 struggling with the rationale for that third group which  
12 does get --

13 MR. SCHROCK: Uh-huh.

14 THE COURT: -- not as good treatment as the first  
15 group and you don't know whether they're going to have as  
16 good treatment ultimately as the second group or not.

17 MR. SCHROCK: Well, the way -- from the estate's  
18 perspective, we looked at it and said we think that if you  
19 send a notice out to everyone and it's adequate notice and  
20 you don't take an action to actually opt out, that  
21 consistent with the applicable law, you know, in this  
22 circuit, including this court, that that's actually consent  
23 to come into the program.

24 THE COURT: No. I understand --

25 MR. SCHROCK: And so we want the --

1 THE COURT: Look, there's a separate --

2 MR. SCHROCK: We would like to get the 25 percent  
3 discount.

4 THE COURT: Well, okay. So it's to get the 25  
5 percent discount.

6 MR. SCHROCK: That's the benefit to the estate, of  
7 course. Yes.

8 THE COURT: But there's a -- but they're not  
9 getting the first payment.

10 MR. SCHROCK: But they're getting the second  
11 distribution. So they're catching up with the same group  
12 who, you know, like affirmatively opted in. And it's a --

13 THE COURT: Well, when you say catch up, are they  
14 always behind or do they catch up --

15 MR. SCHROCK: No. They catch up with the second  
16 distribution and then --

17 THE COURT: So they're pro rata with the first  
18 people --

19 MR. SCHROCK: Correct.

20 THE COURT: -- as part of the second distribution.

21 MR. SCHROCK: That's correct.

22 But this is a similar mechanism that's, you know,  
23 been used in at least, you know, the Toys case. We think  
24 that if the notice is adequate, it's fair to ask parties,  
25 you know, listen, you're going to get a, you know, an



1 earlier payment if you just fail to take an action. And it  
2 is consent, you know, we believe under applicable law.

3 THE COURT: And the reconciliation process, the  
4 claims liquidation allowance process, that starts for that  
5 second group when, after the first one is done with or --

6 MR. SCHROCK: I mean, we're going to have to spend  
7 a lot of time between now and December 1st on -- depending  
8 on how many people come in, I think, with the first group.  
9 If resources allow us to keep reconcile -- we've got  
10 objections on file which has been the impetus for  
11 reconciling a lot of the other administrative claims that  
12 are -- that we're aware of or that are on file with the  
13 Court.

14 So I would say it's -- I want to say that that's  
15 something that's going on now, but certainly will be at a  
16 much more intense focus after December 1st.

17 THE COURT: All right. I didn't see this three  
18 group mechanism in the Toys "R" Us construct or in the  
19 Teligent construct. It was really just --

20 MR. SCHROCK: Right.

21 THE COURT: -- you know, opt in or opt out.

22 MR. SCHROCK: Right.

23 THE COURT: Well, no. Teligent had the deemed --

24 MR. SCHROCK: Yeah. They had the deemed --

25 THE COURT: -- the deemed agreement.

1 MR. SCHROCK: Yeah.

2 THE COURT: But there was no -- there were only  
3 two treatments.

4 MR. SCHROCK: Right. Right.

5 THE COURT: So to me if you're going to have a  
6 deemed opt in, the explanation needs to be -- the context  
7 needs to be set quite clearly, not just the context of what  
8 it is that or how the agreement works as a mechanical  
9 matter, i.e., the opt ins, the affirmative opt ins get their  
10 share of the first distribution, pro rata up to the 75  
11 percent recovery and first look at as far as the  
12 reconciliation process, and the second group then catches up  
13 in the second distribution and gets looked at. And then the  
14 opt outs get paid when they get paid on the effective date.

15 But I think it's important to have some basic  
16 information shared with them as to the, you know, as to the  
17 economic consequences of making these decisions. You know,  
18 I mean we just had a lengthy hearing on when the -- when you  
19 would normally expect to get paid --

20 MR. SCHROCK: Yes.

21 THE COURT: -- a hundred cents on your claim. And  
22 I think people should have a sense of that, if they're going  
23 to make that type of decision.

24 For example, there is some risk, I suppose,  
25 although hearing the evidence I don't think it's a very

1 large one, but some risk that if you neither opted out nor  
2 opted in you might not get paid --

3 MR. SCHROCK: Right.

4 THE COURT: -- as much as the first group.

5 So I think you have to come up with something to  
6 lay that out. And a fair amount of that has already been  
7 laid out in the charts that support -- not the exhibits, but  
8 the charts within the declarations of --

9 MR. SCHROCK: Uh-huh.

10 THE COURT: -- Mr. Griffith and Mr. Murphy. But I  
11 just don't see how --

12 MR. SCHROCK: You want them to be getting some  
13 more context and make a better --

14 THE COURT: I think so. Yeah.

15 MR. SCHROCK: -- decision.

16 THE COURT: I mean, that's why I asked Mr.  
17 Griffith, because he referred to due diligence as part of  
18 the negotiations.

19 MR. SCHROCK: Right.

20 THE COURT: I'm assuming that the group that  
21 settled on the consent program didn't just do it blindly.  
22 They asked you what's available --

23 MR. SCHROCK: Yes.

24 THE COURT: -- you know, the timing, et cetera, et  
25 cetera.

1 MR. SCHROCK: Right.

2 THE COURT: I mean, you could certainly point them  
3 to his -- to those declarations. But I think a paragraph or  
4 two that lays out the expected timing.

5 To put it differently, the more you're relying on  
6 preference recoveries in the ESL DNO litigation --

7 MR. SCHROCK: Right.

8 THE COURT: -- the more you're going to have to  
9 wait.

10 MR. SCHROCK: Right.

11 THE COURT: And you may be willing to wait for  
12 that extra 25 percent.

13 MR. SCHROCK: Right. They're almost -- I'm  
14 picturing it. It's something almost like risk factors --

15 THE COURT: Yeah.

16 MR. SCHROCK: -- associated with each choice.

17 THE COURT: Correct. And the reason I raise the  
18 intermediate choice --

19 MR. SCHROCK: Uh-huh.

20 THE COURT: -- was to me that's the hardest one to  
21 handicap.

22 MR. SCHROCK: Yeah.

23 THE COURT: Now it may be that someone's just not  
24 paying any attention and they don't deserve any notice  
25 because they're not paying any attention. But --

1 MR. SCHROCK: Right.

2 THE COURT: -- at the same time you're not really  
3 relying on that. You're relying on the fact that you're  
4 giving them an actual choice to make, what's the legal basis  
5 for it at least.

6 MR. SCHROCK: Well, should Your Honor -- we could  
7 certainly draft something that -- and come up with  
8 something, I believe, for that should you --

9 THE COURT: I mean, for example, in Teligent it  
10 was clear that if they didn't make this choice --

11 MR. SCHROCK: Right.

12 THE COURT: -- they would get nothing.

13 MR. SCHROCK: Right.

14 THE COURT: So that's really easy. That's a  
15 really easy risk factor.

16 MR. SCHROCK: Right. We can't say that.

17 THE COURT: You can't say that.

18 MR. SCHROCK: Right. Right.

19 THE COURT: But I think that without --

20 MR. SCHROCK: Right. There's a risk, though, that  
21 you could get substantial delayed payment and, you know,  
22 there's some risk that you may not get anything --

23 THE COURT: Right.

24 MR. SCHROCK: -- or get a reduced amount.

25 THE COURT: Right.

1 MR. SCHROCK: Yeah. I think that we can certainly  
2 draft that and we'll have our -- I know -- I get what you're  
3 looking for, Judge. We'll put something together on that.

4 THE COURT: So can I -- I go back to maybe a more  
5 fundamental question, which is I guess ultimately the one  
6 the U.S. trustee raised initially, which is why seek  
7 confirmation now when you won't be going effective for some  
8 time? I'm assuming the answer is that you could now give  
9 assurance to all of these administrative expense creditors  
10 that this is it.

11 MR. SCHROCK: This is it.

12 THE COURT: The plan's confirmed. You could see  
13 your recovery and you have a fairly simple choice, which is  
14 opt in, don't do anything, or opt out. But you know that  
15 there won't be any other contingencies because --

16 MR. SCHROCK: Right.

17 THE COURT: -- other than what's been -- what is  
18 disclosed to you in the election form because the plan has  
19 been confirmed.

20 MR. SCHROCK: And we think that there's a  
21 substantial administrative expense savings, you know, by  
22 just kind of going into that mode, whether -- we're not  
23 going to be dealing with the onslaught of frankly an  
24 administrative claim request that parties aren't going to be  
25 trying to -- plan related litigation obviously is off the

1 table.

2 THE COURT: Right.

3 MR. SCHROCK: We're just purely in kind of just  
4 the wind down estate mode where the cases are still open.

5 THE COURT: Okay.

6 MR. SCHROCK: Your Honor, as to feasibility, we do  
7 think that, you know, that consistent with the law we've  
8 made our showing. We've carried our burden. Feasibility is  
9 not a guaranteed, you know, success, a reasonable  
10 probability. And we think that with the unrefuted evidence  
11 in front of the Court that -- about what we already have,  
12 about what we expect to have and all of the work we've done  
13 around the claims, that we can certainly say we have a  
14 reasonable probability, and more than that, to be able to go  
15 effective. And that is certainly everybody's single mission  
16 to be able to do that.

17 I think that, you know, I'll save the remainder of  
18 my comments for any other -- for rebuttal in terms of any  
19 other arguments that are posed in opposition to  
20 confirmation. But I know the ad hoc claimants and a couple  
21 of other parties in support of confirmation wanted to stand  
22 up and say a few words.

23 THE COURT: Okay.

24 MS. MORABITO: Good afternoon, Your Honor. Erika  
25 Morabito at Foley & Lardner on behalf of the ad hoc vendor

1 group.

2 THE COURT: Good afternoon.

3 MS. MORABITO: And I refer to that group as it's  
4 defined in the administrative expense claim program. But to  
5 be clear, our group is comprised really primarily of three  
6 creditors: Whitebox Asymmetric Partners, Cherokee Debt  
7 Acquisition and Hain Capital.

8 Together they've asserted about \$35 million in  
9 administrative claims. But in addition to these clients, we  
10 also have original holders of claims. And I think that's an  
11 important distinction because I don't think that was clear  
12 on some of the pleadings that we've seen recently.

13 It's difficult to stand here today, to be honest  
14 with you. On one hand we're very proud of what we've  
15 accomplished recently and the fact that the debtors have a  
16 plan that we believe does give the best chance of recovery  
17 to the admins. But on the other hand, we're really all  
18 trying to, I think, make best of a very difficult situation.

19 A lot of things happened good in this case that  
20 people forget. Everybody wants to talk about conversion.  
21 And this case did get vendors paid. It did get landlords  
22 paid. And people were employed for a much longer time than  
23 they had been in the past.

24 But the case took a turn for the worse. We know  
25 that. That's why we're here. Obviously, it's been a domino



1 effect since then with people pointing fingers at each other  
2 and a lot of inter-creditor fighting. And these are all  
3 factors that were taken into account when we decided to  
4 ultimately agree to an administrative expense program.

5 And I think it's important from a timing  
6 standpoint in terms of when we got involved and why we got  
7 involved. We entered our appearance on July 9th. That's  
8 important because a lot of stuff in this case had happened  
9 previously. And the reason we got involved and the reason  
10 we got calls from administrative creditors primarily was  
11 because it was almost very similar to what happened in Toys  
12 R Us when we were called there and asked to see if we  
13 couldn't somehow get involved and see if we could bridge a  
14 gap so the plan could be confirmed and that we could at  
15 least try to help to get a recovery for the administrative  
16 creditors.

17 The other reason that date is important, Your  
18 Honor, is July 10th we got a call from Mr. Wander and his  
19 group, and I sat here this morning and was a little  
20 disappointed and offended by some of the statements that  
21 were made. And the reason I say that today is because we  
22 have a ton of admin creditors that are listening in on this  
23 call, and there's a lot of administrative creditors in this  
24 courtroom today who don't have the benefit of understanding  
25 the diligence and the process and what was involved to

1 getting to an agreement such as the one that's been reached  
2 and set forth before Your Honor today.

3 We've been contacted by a lot of them to  
4 understand what the process was and how the Court was  
5 involved and the diligence that was done, a lot of the  
6 questions that you asked Mr. Griffith and Mr. Schrock just a  
7 few minutes ago.

8 And so I do want to walk the Court through that  
9 because I do think for those that are listening and those  
10 that are considering whether or not it is in their best  
11 interest to opt in, all they really heard today is kind of a  
12 one-sided view of that.

13 We were contacted by Mr. Wander on July 10th, and  
14 since that time in this three months I think maybe there's a  
15 been a couple or a handful of days that have gone by that we  
16 have not been on the phone with him or his group or Mr.  
17 Sarachek and his group. We saw this as a combined effort  
18 and an opportunity to join forces to see if we couldn't find  
19 a mechanism and a way to be able to get some sort of cash  
20 distributed to the administrative creditors.

21 Along those lines, because maybe we are the larger  
22 firm and we have greater resources and because our clients  
23 had greater resources, we were sort of pushed out in front  
24 and asked if we could kind of plow the path. And we did  
25 that, and our clients paid for that. And nobody cared at

1 that time that some of our clients were claims purchasers.

2 It made sense to them because we had a mechanism and an  
3 avenue to be able to get a seat at the table.

4 We have taken depositions in this case. We have  
5 appeared at depositions in this case. We have shared  
6 transcripts. We have entered a common interest agreement  
7 with them. They knew about the agreement, not just by when  
8 the filing occurred. They knew about the details and the  
9 terms of an agreement that we were considering reaching way  
10 before we saw the filing last night. They didn't ultimately  
11 know what the final terms were because we didn't agree to  
12 the final terms of the settlement until the 11th hour.

13 But I think it's disingenuous for Mr. Wander to  
14 make a representation to other admin creditors who are  
15 listening that this was somehow some behind closed doors  
16 deal that was struck with a couple of admin creditors who  
17 had the largest claims, and that he and his clients and  
18 constituents weren't involved in the process because, to the  
19 contrary, they were.

20 We said we got involved on July 7th. On July 9th,  
21 we filed -- I'm sorry -- on August 2nd, we filed our  
22 objection, which is docket number 4721, to confirmation.  
23 And like other admin creditors at that time, we did not  
24 think that keeping this plan going was in the best interest  
25 of the estate. And we were certainly an advocate of

1 conversion or some sort of mechanism that would allow for a  
2 recovery. But watching an estate diminish in resources was  
3 not something that our clients wanted either.

4 Frankly, when we had the first chamber conference  
5 on September -- let me see when that was -- on September  
6 9th, we -- the biggest concern that we had was how do we  
7 really get a seat at the table. We weren't getting a lot of  
8 love. I think we were considered the Johnnie come lately by  
9 the committee and some of the other professionals. But we  
10 needed an opportunity and a wedge to be able to get --

11 THE COURT: Well, there's no love in bankruptcy,  
12 so.

13 MS. MORABITO: Fair enough.

14 And so we did. And so we had a judge's chamber's  
15 conference on September 12th. And Your Honor said at that  
16 point that we would have a seat at the table, not just us  
17 but the administrative creditors.

18 And it was really after that point, and I think  
19 the message was received by all parties, that we needed to  
20 work harder. We needed to try to come together at this  
21 juncture in the case and try to make something better or  
22 good out of something that wasn't what any of us intended  
23 when this case began.

24 And so we did and we entered into real settlement  
25 discussions. And while those settlement discussions, as Mr.

1 Schrock said, might have been led by Foley after that point,  
2 like we said they -- all of the admin creditors that we were  
3 dealing with, including Mr. Wander and Mr. Sarachek's groups  
4 were involved.

5 Additionally, we have had several administrative  
6 creditors call us throughout this process to try to get a  
7 sense of whether or not what we were considering doing made  
8 sense to them.

9 On September 23rd, we had a second meeting with  
10 Weil Gotshal and that meeting lasted virtually all day. And  
11 that was when we worked on a construct and a settlement that  
12 we thought would be something that was much better than what  
13 you saw was attached to their -- it was attached as a  
14 construct presented with a confirmation brief which was  
15 Exhibit B filed on September 13th, 2019. That was the  
16 original construct we had, versus where we are today and the  
17 difference in what the construct is.

18 We walked away feeling pretty optimistic at that  
19 meeting on September 23rd, but we knew there was still more  
20 work to be done. We circled back and we talked to the other  
21 administrative creditors again, and while they were grateful  
22 at that time for the work that's been -- that had been done  
23 and the additional items that we got as part of a  
24 concession, they still wanted more.

25 And so, again, we went back and we continued to

1 negotiate. What we did get, and I think you saw this in the  
2 debtors' pleadings, was we got a confirmation hearing  
3 adjourned, which is why we went to the new dates of the 27th  
4 of September and October 3rd. And that was really well  
5 intended, I think, by all the professionals to see if we  
6 could reach some sort of compromise such that we could be  
7 here today sitting on the same side as opposed to being  
8 allies.

9 Ultimately, though, and sadly, I think, the  
10 interests of the admins diverged when our philosophy is that  
11 a settlement means there's compromise and it means you don't  
12 get everything that you want. These claims in this case are  
13 very unique. What may be beneficial to one creditor is not  
14 necessarily beneficial to another.

15 For example we hear a lot about the World Imports  
16 case. Not all creditors have World Imports case issues.  
17 And to those creditors that don't have World Import case  
18 issues, it would be disadvantageous to them for the debtors  
19 to take a blanket position on a theory of law that could  
20 ultimately then negate or significantly -- I'm sorry --  
21 which would ultimately, if the debtors lost, increase the  
22 amount of claims that would come into the estate and  
23 significantly reduce the recoveries that could go to the  
24 other admins.

25 Like that you also had the preferences. Not all

1 claimants had preferences. So asking the debtors to enter  
2 into a settlement agreement that meant that the debtors  
3 could have no defenses or minimal defenses to claims at the  
4 end of the day is not advantageous to all of the admins.  
5 You would be forced with an unknown number of claims and  
6 very limited cash.

7 So why did we enter into the administrative  
8 expense claim program? First, the debtors set this forth in  
9 their materials, but really what we were looking at is, is  
10 conversion better or worse for the administrative creditors  
11 than what we have now with this program. And when we looked  
12 at the alternative versus what we were able to get from this  
13 program, it was pretty clear that conversion certainly was a  
14 far less better option than what this program offered.

15 First of all, conversion was too risky. There was  
16 incredible potential downside to all the claimants. Many of  
17 the creditors again talking about how they had different  
18 interests. Some of these creditors only have claims against  
19 certain debtors and not other debtors.

20 What this program allows is the claim which  
21 essentially is akin to a claim against a substantially  
22 consolidated debtor, so that if you have a claim against one  
23 of the debtors, it's a claim against all, and then there's a  
24 mechanism for payment.

25 If you went in to a Chapter 7 conversion there

1 would be a big risk there that if you did not have claims  
2 against anybody other than K-Mart, you may not have an  
3 opportunity to get your claim paid.

4 Moreover, if there was a preference action against  
5 you, you could find yourself in the horrible position  
6 whereby you don't have claims against the only solvent  
7 debtor, but yet you're subject to preferences. So you could  
8 ultimately end up owing the estate money.

9 You also had the issue with respect to litigation.  
10 While the debtors don't rely, for purposes of being able to  
11 meet the standards of 1129(a)(9) for purposes of  
12 confirmation on recoveries from Transform or ESL, the admin  
13 creditors are certainly hoping that the debtors are  
14 successful with that because that's going to be a large  
15 number that would come in and would be available for  
16 distributions to the admins and possibly unsecureds.

17 If you convert to a 7, we believe that it  
18 jeopardizes the current litigation that's pending against  
19 Transform and ESL. It would require delay in the litigation  
20 and a substitution of counsel possibly that may not have the  
21 same institutional knowledge that the debtors and Akin has.

22 Comparatively let's look at the admin expense  
23 program. One of the biggest things we wanted to get, and  
24 Your Honor hit on this earlier, was \$20 million, we wanted  
25 some component of cash. And the reason we came up with \$20



1 million was we looked at it as at least ten percent of what  
2 they believed could be the outside number in terms of  
3 administrative claims. So \$20 million was roughly assuming  
4 that you had \$200 million administrative claims.

5 That's something that if this case converted to a  
6 7 they wouldn't have. And you heard Mr. Griffith testify  
7 today that they have about \$50 million in cash. The estate  
8 isn't getting more flush with cash. There is a large  
9 dependent on recoveries, both from preference actions and  
10 also from litigation. So cash is premium right now. And so  
11 to get the debtors to agree to segregate \$20 million into a  
12 fund so that it would be available for the admin creditors  
13 we thought was an enormous benefit.

14 Secondly, we've always approached this with  
15 everybody needs to share in this. And so both the debtors'  
16 counsel as well as the committee's counsel did agree to put  
17 \$2 million of their current carve out into this segregated  
18 account to make it available for admins.

19 The other thing that we kept hearing from admins  
20 when we went to negotiate this was that it was very  
21 important to them, and they didn't understand the concept of  
22 the creditors' committee having 20 -- having the  
23 availability of \$25 million up front in their view that  
24 could be distributed to administrative creditors. And they  
25 felt like that number was too big.

1           And so one of the things that we asked for was  
2           could there be a delay in time such that they could still  
3           have sufficient funds to litigate the claims against ESL and  
4           Transform, but could they free up some of that cash now so  
5           that the administrative creditors could also get a portion  
6           of that. And ultimately that was another big part of the  
7           agreement.

8           The other thing that I think is important and,  
9           frankly, a reason why it took us as late as it did to get to  
10          an agreement that we were ultimately able to file on  
11          December -- I'm sorry -- on October 1 was the administrative  
12          expense claims representative.

13          This is so important and I can't underestimate  
14          that. We keep hearing people talk about what the  
15          restructuring committee is going to do and that there's  
16          going to be clearly a period of lapse between confirmation  
17          and the effective date. And the administrative creditors  
18          are concerned that if there is no representation for them at  
19          a level that involves both the claims reconciliation process  
20          and also distributions to administrative creditors pursuant  
21          to this program, that they won't be treated fairly or it  
22          won't be done efficiently, or that what we're going to see  
23          is just additional fees going to professionals.

24          So while everybody seemed to be on board, meaning  
25          all of the parties that were negotiating the construct at

1 least with respect to having a representative, the biggest  
2 disagreement was the role that that representative would  
3 play. And in our view this couldn't be window dressing. It  
4 needed to be somebody that really had the ability to be able  
5 to make decisions on behalf of the admins and potentially  
6 participate in some of the decisions as it relates to  
7 reconciliation, including the World Imports case.

8 So I would direct Your Honor's attention to the  
9 debtors' supplemental memorandum of law, which is  
10 document -- I'm sorry -- docket entry 5296. And if you turn  
11 to -- on the top, it says page 78 and 79 of 140. This is  
12 part of the construct that I think those administrative  
13 creditors that have concern about how this process is going  
14 to work and to make sure that it's fair and efficient really  
15 need to see.

16 The first one is on page 27 at the bottom, which  
17 would be page 78 of 140 of docket 5296. And this talks  
18 about the appointment of the administrative representative  
19 and that it would be done after confirmation. And the  
20 important part of this is, if you read halfway through  
21 paragraph 7, it says that this administrative -- let's see:

22 "Prior to the effective date, and once the cash  
23 reserve account has been funded with 10 million in the  
24 aggregate, the debtors' restructuring committee together  
25 with the creditors' committee and admin representative will

1 commence a telephonic meeting no less than every 30 days to  
2 review, among other things, the status of the reconciliation  
3 of administrative expense claims as well as the latest  
4 budget and variance reporting of the debtors, provided that  
5 in the interim the debtors shall provide, among other  
6 things, weekly budgets, various reporting, as well as an  
7 accounting of the total assets and any net proceeds derived  
8 there from to the pre-effective date committee on a  
9 confidential basis."

10 Additionally, this administrative representative  
11 who will be, as Your Honor pointed out, how are they going  
12 to be selected? Once we do have the opt in group and people  
13 are able to weigh in on who that representative will be,  
14 they will be appointed. And this is important because  
15 here's where we get to paragraph V on page 28.

16 "This person shall serve alongside the debtors'  
17 restructuring committee and the creditors' committee to work  
18 through 503(b)(9) and 503(b)(1) issues regarding inducement,  
19 date of receipt, port of origin, and any exposure on account  
20 of preference actions, and to ensure and expedite a fair  
21 process to claims resolution in emergence."

22 Each of those elements were specifically chosen  
23 because it addressed the issues of (indiscernible). So  
24 while we couldn't get the debtors to agree to take a blanket  
25 position on a legal theory because it could have both

1 positive and negative consequences to admin creditors based  
2 on your claim, we at least got a representative involved  
3 that could look at those issues fairly.

4 Additionally, and this was important, the admin  
5 representative will be entitled to applicable insurance  
6 coverage. They will have adequate compensation provided and  
7 paid for by the debtors. And that's important. We don't  
8 want someone there that basically is a figurehead and  
9 doesn't have any teeth to do anything.

10 By having them to be adequately compensated, we  
11 believe that will provide or at least for the opportunity to  
12 have somebody on there that can represent the interest of  
13 the admins.

14 Secondly, the other role of this person which is  
15 really important is to help the admins to get comfortable  
16 with understanding that there's going to be costs going  
17 forward in this case, but it's not going to be an evergreen  
18 account. It's not going to be one carve out of this  
19 transitioning over to a post-confirmation carve out whereby  
20 the estates and the professionals have free will to use  
21 whatever money they need to to prosecute the cases and the  
22 claims.

23 What this person does is to the extent that a  
24 distribution is wanting to be held up to pay to the admins  
25 because the estate believes that they need additional cash

1 to be able to resolve or respond to pending motions in the  
2 case, it can't just be done by those representatives without  
3 input from the admin. And by input I mean they have to  
4 agree unanimously that if a distribution, a further  
5 distribution to admins is to be held up in favor of putting  
6 more money into the operational costs of the estate, which  
7 includes professional fees, then those parties would need to  
8 come before the Court and the Court would have an  
9 opportunity to make a decision as to whether or not it's  
10 more appropriate to give distributions to admin creditors or  
11 if the estate needs additional funds.

12 So each of those were heavily negotiated. Those  
13 were things that we thought were extremely important. And  
14 we read a declaration yesterday, again, that made it seem as  
15 though we just cut a deal and had our claims allowed and  
16 that's why we entered into this settlement.

17 If I haven't said enough already to show that  
18 that's true, this last provision about having a claims  
19 representative --

20 THE COURT: Well, not true you mean.

21 MS. MORABITO: Yeah. Not true. You're right.

22 To have this claims representative involved in the  
23 reconciliation process has absolutely nothing to do with us  
24 now because we went through an extensive reconciliation  
25 process with Mr. Murphy, also with the representatives from

1 the committee and specifically FTI. We had a large discount  
2 given on our claims and yet again we still agreed to only  
3 get up to 75 percent by opting in.

4 When we asked for this admin expense claim to be  
5 involved in reconciliation it was certainly not to benefit  
6 my clients because our claims have already been reconciled.  
7 Yet our clients are the ones that paid the legal fees to go  
8 through and ask for these additional items for other  
9 administrative creditors.

10 So I can't emphasize enough that this was a highly  
11 negotiated program that we do believe ultimately benefits  
12 the administrative creditors.

13 Unfortunately, though, we heard today, we saw from  
14 the objections, we saw from the declarations that this is  
15 just still not enough for other admin creditors. I'm  
16 hopeful though and cautiously optimistic. We've -- now that  
17 we've talked to a couple of people today and we spoke to a  
18 couple of people yesterday, we do believe that pretty soon  
19 you are going to see relatively quickly several  
20 administrative creditors opting in now that they understand  
21 the construct and how the negotiation process worked.

22 Again, at the end of the day there's a lot of  
23 emotion now. There's a lot of strong personalities. This  
24 is a difficult case. I think to sort of echo what Mr. Shock  
25 said, which is we're trying to make the best of a difficult

1 situation and we can't come to another scenario whereby this  
2 isn't in the best interest of the estate and the best  
3 interest of the administrative creditors.

4 I don't have anything else, Your Honor. If you  
5 have any questions, I'm happy to answer any questions about  
6 the program itself.

7 THE COURT: Okay. No. I don't think so.

8 MS. MORABITO: Thank you.

9 THE COURT: Thanks.

10 (Pause)

11 MR. DUBLIN: Good afternoon, Your Honor. Phil  
12 Dublin, Akin Gump, on behalf of the committee. I'll be  
13 brief.

14 THE COURT: Good afternoon.

15 MR. DUBLIN: We've been -- Your Honor has been at  
16 this for a long time and has about 300 admin creditors that  
17 probably still want to say something about the program that  
18 the ad hoc group's counsel just went through.

19 I just want to highlight a couple of things,  
20 acknowledging that what we're looking to do here is a little  
21 unorthodox with confirming the plan and not really being  
22 sure when we're going to go effective subject to the types  
23 of situations that Your Honor referenced where there's  
24 regulatory pools and things of that nature which sometimes  
25 leave companies in bankruptcy for a while, while they wait



1 to go effective.

2 We've been at this since -- for about just about a  
3 year. Obviously, a lot of contentious issues before Your  
4 Honor and with the debtors and with Transform. We were  
5 able, shortly after the disclosure statement hearing, to put  
6 our differences aside with the debtors and jointly pursue  
7 the path that got us to where we are today.

8 There were a number of changes made to the plan  
9 right before the disclosure statement hearing that address a  
10 number of the committee's concerns with respect to the  
11 proposed substantive consolidation as well as with respect  
12 to the PBGC settlement.

13 One of the things I want to highlight about the  
14 PBGC settlement, which at least a couple of creditors I  
15 think have raised issues within propriety of is as greater  
16 proceeds come in from the causes of action there are  
17 benefits to unsecured creditors from the PBGC settlement  
18 because their claim is essentially reduced from their  
19 original \$1.4 billion claim that they were seeking to have.

20 The creditors' committee has been bullish on the  
21 causes of action. That will be pursued jointly by the  
22 debtors and the committee pre-effective date, and by the  
23 trust post-effective date. And we expect the proceeds  
24 ultimately -- that will ultimately come in will be  
25 greatly -- excuse me -- will be much greater than was put

1     forth in the disclosure statement which generally are  
2     conservative numbers to ensure that the plan is feasible and  
3     satisfies the best interest of creditors' test and the like.

4             The path forward is not going to be easy. We know  
5     that the estates are up against an adversary in ESL and  
6     other well healed defendants. And it was important that we  
7     have appropriate financing to pursue those causes of action.  
8     And part of the compromise with the admin creditors was to  
9     reduce the initial cash available to pursue the litigation  
10    to \$15 million. But there is a mechanism to get that back  
11    up to \$25 million once -- in advance of going effective in  
12    the aggregate.

13            So some of that money will be used. It's not  
14    going to get replenished and become evergreen. But in the  
15    aggregate there will have been \$25 million available in the  
16    first instance for the pursuit of those causes of action.

17            We believe that the agreement that's been reached  
18    with the admin creditors is beneficial to everybody. I  
19    think that our pleading that we submitted in connection with  
20    confirmation and the liquidation analysis made clear that a  
21    substantial number of admin creditors will get no recovery  
22    in these cases if these cases are converted.

23            Mr. Schrock highlighted that confirming the plan  
24    now will save administrative expenses. We agree with that  
25    wholeheartedly. Everyday there are numerous motions being

1 filed for payment of admin expenses. The agreement that's  
2 been reached sets forth the path forward and the options  
3 available for admin creditors to get paid sooner or to wait  
4 and get 100 cents. And that is purely voluntary and  
5 available for them.

6 Just to highlight a couple of other things, we've  
7 had recent conversations with counsel for the estates that  
8 are pursuing the preference actions. We expect upwards of  
9 200 complaints to be filed before the end of the month.  
10 That process is ongoing. There's been a lot of work.  
11 There's been about 140 settlements already. So that's  
12 something that has been bringing funds into the estate as  
13 part of the cash that's available now and we expect it to  
14 continue to come in.

15 We heard earlier about the \$5.1 million that's  
16 coming in from the school district. And we expect most of  
17 those assets to be monetized very quickly. We are all  
18 incentivized to go effective as soon as possible, and we  
19 think that working together with the debtors and the  
20 administrative expense representative, we will get to that  
21 goal very quickly.

22 With that, Your Honor, unless you have any  
23 comments, I will reserve some time to respond to any  
24 objections to the extent necessary.

25 THE COURT: Okay. Thanks.

1 MR. DUBLIN: Thank you.

2 (Pause)

3 MR. RAYNOR: Good afternoon, Your Honor. Brian  
4 Raynor from Locke Lord on behalf of the Pension Benefit  
5 Guarantee Corporation. In comparison, I'll be very brief  
6 with my comments.

7 PBGC is the largest unsecured creditor in this  
8 case with upwards of \$1.7 billion in claims. Those claims  
9 are joint and several against all of the debtors. So to put  
10 it mildly, PBGC has a lot of -- a lot on the line in these  
11 cases. We have had some severe disagreements with the  
12 debtors and at times with some of the professionals for the  
13 committee on a number of issues, including the sale, the  
14 rights to the KCD admin claims, the amount of the PBGC  
15 claims, the termination of the pension plans, the plan  
16 structure, the toggle, the settlement of Subcon, and the K-  
17 Mart premium.

18 Despite all these disagreements we worked at arm's  
19 length to settle them with the debtors' professionals. The  
20 PBGC didn't get everything that it wants. The debtors  
21 didn't get everything that they want. But ultimately it was  
22 a building block for a global settlement and a framework for  
23 these cases to reach some sort of finality.

24 We think this framework is fair. We think it  
25 offers finality, and we think that it is clearly better than

1 the alternative which would be a Chapter 7 liquidation.

2 As the largest creditor in these cases PBGC asks  
3 that the plan be confirmed and that confirmation incorporate  
4 the global settlement.

5 THE COURT: Okay.

6 MR. RAYNOR: Thank you, Your Honor.

7 THE COURT: Thank you.

8 (Pause)

9 MS. LIBERMAN: Sadly, Your Honor, you're now going  
10 to hear some objections.

11 THE COURT: Yes.

12 MS. LIBERMAN: Donna Lieberman for Relator Carl  
13 Ireland. Your Honor, I note that counsel to our  
14 co-mortgagee, the United States, is here today as well from  
15 the U.S. Attorney's Office.

16 I will keep it brief. I very much appreciate the  
17 Court's comments about the lien having to be protected. We  
18 objected to the sale of our collateral. We got a  
19 replacement lien. We also got, to the extent of diminution  
20 in that lien, a super priority administrative claim with  
21 respect to all of the debtors' assets.

22 We've filed a motion seeking a determination of  
23 our claim and payment of our claim. Your Honor, we filed a  
24 very narrow objection and in some respects it's not an  
25 original one. Like many others we want to know that the

1 money is there or will be there in the very near term.

2 We have a somewhat unusual situation, Your Honor,  
3 though. The debtors' response to our objection, and in its  
4 initial confirmation brief was that no creditors junior to  
5 us would receive a distribution unless our claim could be  
6 reserved for or paid.

7 We then learned yesterday morning that there is a  
8 proposal, and it's very much a plan proposal. These are not  
9 ordinary course payments. But there is a proposal to induce  
10 administrative claimants to come to the table. And it  
11 involves \$20 million going into a segregated account within  
12 days of this Court entering a confirmation order.

13 Your Honor, respect -- with all due respect to the  
14 debtors we believe that our client has a superior claim and  
15 essentially the debtor is paying others ahead of our client  
16 without adequately reserving for our client and without  
17 paying our client.

18 THE COURT: Well, you have a superior claim to the  
19 extent that your collateral has diminished, right?

20 MS. LIBERMAN: True. But we also have a unique  
21 claim, Your Honor, because as --

22 THE COURT: Well, but where's the evidence that  
23 your collateral is diminished?

24 MS. LIBERMAN: But we -- we're also in an unusual  
25 situation. I guess you heard the testimony as far as the

1 debtors are aware and Mr. Murphy addressed. We are the only  
2 secured claim out there that the debtors are kind of  
3 conceding they think is valid. And they're not making any  
4 provision to protect us. They're -- you know, they're --  
5 you know, one way or the other it appears they're giving us  
6 a valueless lien.

7 THE COURT: Well, I don't understand that. You  
8 have a lien on all of the assets.

9 MS. LIBERMAN: No. We have -- the replacement  
10 lien is limited to the proceeds of--

11 THE COURT: All right. So you have --

12 MS. LIBERMAN: -- our collateral.

13 THE COURT: -- a right, though, for adequate  
14 protection --

15 MS. LIBERMAN: Yes.

16 THE COURT: -- yet you could look to all the  
17 assets for that, right?

18 MS. LIBERMAN: But our concern, Your Honor, is the  
19 assets are being diminished, not just in the ordinary  
20 course, but with \$20 million being moved into --

21 THE COURT: But does that --

22 MS. LIBERMAN: -- an account --

23 THE COURT: -- does that leave you without  
24 adequate protection? That's really the underlying issue.  
25 And I am having a hard time seeing that given the other

1 assets.

2 MS. LIBERMAN: Your Honor, I -- respectfully I  
3 disagree. What we've been hearing all day is the debtors  
4 don't have as much cash as they would like. They don't have  
5 the cash --

6 THE COURT: Cash isn't the only --

7 MS. LIBERMAN: -- to go effective.

8 THE COURT: -- asset.

9 MS. LIBERMAN: They're hopeful that things will  
10 improve. And it's all very uncertain. We still don't know  
11 that this case is administratively solvent.

12 THE COURT: It doesn't have to be administratively  
13 solvent. You're first. It just has to be solvent to the  
14 tune of \$18 million.

15 MS. LIBERMAN: But, Your Honor, that's why I'm  
16 concerned about \$20 million --

17 THE COURT: No, but --

18 MS. LIBERMAN: -- and I can --

19 THE COURT: I know your concerned, but you need to  
20 show me why you're not adequately protected with all the  
21 other assets. All the other assets add up to like before  
22 the litigation far more than your client is owed.

23 MS. LIEBERMAN: Your Honor, we are simply asking  
24 that the debtors --

25 THE COURT: Why don't you sit down with the



1 debtors and work out an adequate protection stipulation  
2 where your lien extends to the other assets first? I mean,  
3 Mr. Schrock said he was aware of that. I -- this is  
4 circular. I know you're concerned. Right now, you don't  
5 really have anything more than a superpriority claim,  
6 although it is a superpriority claim.

7 But I don't see why, if they're going to be using  
8 your collateral, you're not entitled to a replacement lien  
9 on -- if it's not cash, than something that's on its face  
10 worth a lot more than \$18 million.

11 MS. LIEBERMAN: Your Honor, we would be delighted  
12 to discuss that with the debtors. To date, we've had no  
13 success.

14 THE COURT: Okay. I think that would satisfy the  
15 objection as far as I'm concerned, based on this record,  
16 because I do believe that eventually -- and as far as just  
17 the 18 million is concerned, really rather soon that money  
18 will come in.

19 MR. SCHWARTZ: Well, we're happy to sit down and  
20 work that out, Your Honor.

21 THE COURT: Okay.

22 MS. LIEBERMAN: Thank you, Your Honor.

23 MR. SCHWARTZ: Your Honor, good afternoon.

24 Jeffrey Schwartz, McKool Smith, on behalf of Winners  
25 Limited, an administrative expense claimant.

1           Very briefly, Your Honor, we have -- Winners has a  
2           strong concern about a plan going effective without a  
3           further review by the court as to feasibility. We filed an  
4           objection. Our --

5           THE COURT: I just had the review. That's why  
6           I've been here since 10 o'clock --

7           MR. SCHWARTZ: No --

8           THE COURT: -- 10:30. I mean, what more review do  
9           you want me to do?

10          MR. SCHWARTZ: Okay. Well, in terms of going  
11          effective. A plan -- confirming a plan, per se, has no  
12          legal significance. It is accepted when it goes effective,  
13          then it has legal significance. Thus far, Winners'  
14          experience in this case is that -- filed our motion for the  
15          administrative expense on December 21, 2018. We appeared  
16          before the Court on April 14th and were not heard. Then we  
17          appeared before the Court on May 21st, and -- with just a  
18          simple legal question as to the proposed 503(b)(1)(A). Your  
19          Honor ruled against us. Your Honor instructed debtor's  
20          counsel to submit an order accordingly, and to just share  
21          the order but not require Winners' consent. And there's  
22          some other parties involved in this.

23          To date, debtor's counsel has not submitted the  
24          order to you. So this is five months later. We've had some  
25          discussions with them and there was circulation of a draft

1 order, but the debtor told us that -- debtor's counsel told  
2 us, who's sitting here, that they didn't see the value in  
3 following the Court's instructions to submit the order.

4 UNIDENTIFIED SPEAKER: I'm sure we didn't say  
5 that.

6 MR. SCHWARTZ: Okay, well -- we have the --

7 THE COURT: Can you give me a copy of your  
8 objection? I'm looking for it here in the binder.

9 MR. SCHWARTZ: Yes. It is -- what was before you  
10 on May 21st --

11 THE COURT: No, no, your plan objection.

12 MR. SCHWARTZ: Oh --

13 THE COURT: If you don't have an extra copy, I'll  
14 just keep looking for it.

15 UNIDENTIFIED SPEAKER: Your Honor, we do. We can  
16 hand it up.

17 UNIDENTIFIED SPEAKER: May I approach?

18 THE COURT: Sure. Thank you. All right. None of  
19 this is in your objection. So your objection is based on  
20 1129 and 11(a)(9) and (a)(11).

21 MR. SCHWARTZ: Feasibility.

22 THE COURT: Yes.

23 MR. SCHWARTZ: Yeah.

24 THE COURT: All right. So let's get to that, sir.

25 MR. SCHWARTZ: Okay. So our issue is that there

1 will not be money -- the debtors -- this 503(b)(9) claims  
2 procedures program, there were no negotiations. There was  
3 no contact. It was to delay allowing the claim, delay us  
4 from going to an appellate tribunal on that issue.

5 THE COURT: Can we focus on the issues in front of  
6 me? I'm going to say it one more time, sir, or else I'll  
7 ask you to move on.

8 MR. SCHWARTZ: Okay.

9 THE COURT: 1129(a)(9) and 1129(a)(11), those were  
10 the two issues you raised in your three -- two and a half  
11 page objection.

12 MR. SCHWARTZ: Right. And our --

13 THE COURT: Now, let's focus on those.

14 MR. SCHWARTZ: -- issue is that we will -- that  
15 there will not be money in this trust to pay, even if we  
16 succeed in getting the claim, the Winners' claim allowed,  
17 and we'll have the money in the trust --

18 THE COURT: And what is the basis? And what is  
19 your basis for saying that?

20 MR. SCHWARTZ: Because Your Honor has said in  
21 April and in May, there will be an estimation proceeding.  
22 There's no expert witness as to the value of the preference  
23 claims, an 80 percent assumption of preference claims is  
24 certainly not in my experience --

25 THE COURT: That's not an 80 percent assumption of

1 preference claims. It's about a 15 percent assumption.

2 MR. SCHWARTZ: And the other --

3 THE COURT: Bud do you disagree with that? Should  
4 we go to the declaration and look at that?

5 MR. SCHWARTZ: Well, I'll accept that I saw  
6 something earlier that it was a much higher number. The  
7 other point is --

8 THE COURT: Well, it isn't. I mean --

9 MR. SCHWARTZ: On the --

10 THE COURT: -- you can't just go throwing things  
11 out like that. I mean, honestly.

12 MR. SCHWARTZ: On the 503(b)(1)(a), and this is  
13 feasibility --

14 THE COURT: Right.

15 MR. SCHWARTZ: -- the debtor had filed something  
16 which said that that amount, if the debtor -- if the Court  
17 ruled against the debtors and the -- and if we prevailed and  
18 others similarly situated prevailed, it would be a \$64  
19 million incremental obligation, administrative expense to  
20 the estate. We may prevail if we get an order --

21 THE COURT: Being on appeal.

22 MR. SCHWARTZ: On appeal. We may prevail. And I  
23 don't -- and I would urge on the Court --

24 THE COURT: I would urge you to think of  
25 something, sir.

1 MR. SCHWARTZ: Yes, sir.

2 THE COURT: What is the alternative to not  
3 confirming a plan based on your argument of administrative  
4 insolvency? It's conversion of the case, correct?

5 MR. SCHWARTZ: That's one option. Another option  
6 is at least before the plan goes effective, we actually see  
7 that there's -- what these claims, administrative claims are  
8 as allowed, and what the real results on preference  
9 recoveries in so far --

10 THE COURT: But that's what I spent the first ten  
11 minutes of this hearing on. Those were my first questions.  
12 When does the plan go effective? Only when you know you can  
13 make the payments you need to make.

14 MR. SCHWARTZ: And what I'm saying to -- Winners'  
15 position --

16 THE COURT: What you're saying to me is you, in  
17 essence, want to stay all of that until your appeal is  
18 determined. So, in essence, you're flipping the argument on  
19 an appellate bond in favor of letting your appeal go forward  
20 on an issue you've lost on below.

21 MR. SCHWARTZ: I'd rather have you decide -- my  
22 client would rather have you decide whether it's proper for  
23 the plan to go effective. That's all I'm saying.

24 THE COURT: But it's not -- it's --

25 MR. SCHWARTZ: Confirmation is one thing, but its

1 effective date -- that's the request.

2 THE COURT: All right. This was not -- either in  
3 your objection, but are you basically saying that as part of  
4 the quarterly reporting mechanism to the Court, perhaps with  
5 status conferences on proceeding towards the effective date,  
6 the debtors would say, "We're ready to go effective now in  
7 the notice of that conference." And the parties who review  
8 that on the docket could say, "Why are you ready to go  
9 effective? You still have all of these claims to be  
10 liquidated." Correct? Is that what you're suggesting?  
11 Because that makes sense to me. That's part of the review  
12 process.

13 MR. SCHWARTZ: All I'm trying to say is --

14 THE COURT: Okay.

15 MR. SCHWARTZ: -- I trust you --

16 THE COURT: Right. Right. All right, fine. I  
17 understand that.

18 MR. SCHWARTZ: Right.

19 THE COURT: But I'm telling you right now, though,  
20 that's not a backdoor way to get a stay pending appeal.

21 MR. SCHWARTZ: I'm not seeking to appeal anything.

22 THE COURT: All right.

23 MR. SCHWARTZ: There's not even an order entered  
24 yet.

25 THE COURT: Well, I know, but I'm just

1 contemplating that argument being made. But I understand  
2 the other point, and I think that's part of what I was  
3 raising with Mr. Schrock and what he said he's been talking  
4 about with Mr. Dublin. SO I understand that argument.

5 MR. SCHWARTZ: That's exactly what we're seeking,  
6 Your Honor. Thank you so very much.

7 THE COURT: Thank you.

8 MR. SINGH: Your Honor, Sunny Singh. If I could  
9 just make one point on that. Just so Your Honor is aware,  
10 in paragraph 14 of the proposed order, in response to  
11 something ESL had raised, we do say we'll give 20 days'  
12 notice before going effective --

13 THE COURT: All right. Well --

14 MR. SINGH: -- so the parties will have a chance  
15 to address that issue.

16 THE COURT: -- but I say --

17 MR. SINGH: Broad notice.

18 THE COURT: -- but you could build that into a  
19 reporting process.

20 MR. SINGH: Yes. We will report on it, and of  
21 course, we will give that final notice before.

22 THE COURT: Okay. Okay.

23 MR. WANDER: Good afternoon, Your Honor. I have a  
24 bunch of comments, but I'll be fairly brief. First of all,  
25 I want to thank the Foley and Lardner attorneys, Erica



1 Morabito and Paul Labov. They were great working with and I  
2 think they're fabulous lawyers. And maybe if I was in their  
3 position with their clients, I might have agreed to the  
4 construct, because they should do what's best for their  
5 clients.

6 Let me tell you what's really where things fell  
7 apart and how I see things, which may be different than --  
8 obviously than the professionals, maybe different than Your  
9 Honor. But let me tell you what my problem is in the case  
10 where we are today.

11 I don't see why the vendors who provided the goods  
12 within 20 days of the bankruptcy, and during the bankruptcy,  
13 should be so far behind the professionals. And where I  
14 think I lost my seat at the negotiating table is I made a  
15 statement that I guess is kind of heresy in some of these  
16 cases. I said, "Maybe the lawyers shouldn't get the next  
17 dollars." Maybe the professionals, who in my rough numbers,  
18 Judge, have gotten around \$150 million, and administrative  
19 creditors with undisputed claims have gotten zero.

20 THE COURT: No, I understand that point, but --

21 MR. WANDER: And --

22 THE COURT: But what you're dealing with here are  
23 two things, I think. One is the DIP order and the  
24 professionals' rights under it, and the other is just a  
25 matter of negotiation.

1 MR. WANDER: So --

2 THE COURT: But the negotiation is with the DIP  
3 order as a background, because normally or often when this  
4 issue arises, and fortunately it doesn't arise that often,  
5 but it does arise in cases, the administrative expense  
6 creditors, including the professionals who are still owed  
7 money, look at each other and say, "All right. What's going  
8 to happen if this case converts? And who's going to be hurt  
9 most by that?" And they'll work out some agreement between  
10 themselves or among themselves.

11 That plays into any situation like this. And it's  
12 not necessarily a forgiveness, it's just, you know, a timing  
13 issue often. But on top of that here, you have the final  
14 order, a DIP order. So that changes that leverage a bit.

15 MR. WANDER: Let's talk about the DIP order, if I  
16 may.

17 THE COURT: Okay.

18 MR. WANDER: And I apologize, Judge. I was not  
19 involved in the case in the first day motions.

20 THE COURT: All right.

21 MR. WANDER: But --

22 THE COURT: This isn't a first day order. This is  
23 an order issued on due notice.

24 MR. WANDER: No, no, but -- so my general  
25 understanding is in a Chapter 11 case, the administrative

1 creditors get paid in the ordinary course of business, and  
2 my understanding is 503(b)(9) vendors can actually be paid  
3 in the ordinary course of business. There was a motion in  
4 this case to pay \$162 million of vendor claims. These are  
5 the vendors who are shipping to a company that some of them  
6 that was financially troubled, some may not, but I believe  
7 that the bankruptcy code and courts want to incentivize  
8 vendors to continue to ship. Otherwise, we'll have Chapter  
9 11 cases filed and there's no inventory.

10 So we say to the vendors, and Congress actually  
11 said when they amended the Bankruptcy Code in BAPCPA 2005  
12 and have 503(b)(9), they basically -- Congress said not only  
13 are the vendors and all of the creditors who provide goods  
14 and services during the case supposed to be at the top of  
15 the waterfall chain, so to speak, but also those who are  
16 providing goods into a financially troubled company should  
17 also be protected.

18 So in the end, and again bankruptcy there are two  
19 principles that I always keep reading about, one, it's a  
20 Court of Equity; and the other is we're here to pay  
21 creditors. This is not a reorganization case. No one's  
22 talking about Sears as it filed on the filing date  
23 reorganizing. It sold substantially all of its assets.

24 Now, the administrative creditors don't get a  
25 committee in the beginning of the case. There's no one

1 really speaking with them. So to afford them in the Court,  
2 and so you have a situation where debtor's counsel  
3 negotiates with the DIP lender this order that seems to  
4 guarantee the professionals getting 100 cents on the dollar.  
5 They're protected -- 80 cents every week it's taken out like  
6 clockwork.

7 THE COURT: Well, that's a separate order.

8 MR. WANDER: Okay.

9 THE COURT: I'm focusing on the DIP order.

10 MR. WANDER: Well, so we have a situation where  
11 the professionals to date have been paid approximately \$150  
12 million. There's \$100 million in cash that's there. Do I  
13 want the -- that's 50 million in the carve-out and they have  
14 50.1 in available cash. So there's \$100 million. And what  
15 things boil down to is I said, "I think we should put a hold  
16 on the professionals getting paid, and let's take that  
17 money, and let's pay undisputed allowed administrative  
18 claims."

19 Now, maybe that's a crazy idea that 150 million to  
20 the professionals, zero to those allowed claimants, another  
21 100 million is really a simple choice. Do we then make it  
22 250 million, basically, because it's 50 in the carve-out?  
23 You're going to take 25 plus 10 for the liquidating trust.  
24 What the Foley people negotiated of to take 20 million out,  
25 basically the -- where it's coming from is just going to be

1 replenished by December 1. So they still get the 25 million  
2 funding of the trust, plus the 10 million.

3 And I simply said, "I don't think the  
4 professionals should be guaranteed 100 cents while the  
5 allowed administrative vendor creditors have gotten zero."  
6 So maybe that's completely wrong, and if so, that's just --

7 THE COURT: Well, you haven't addressed the order.

8 MR. WANDER: Well, you know, Judge, in order for  
9 them not to be able to take out the money each week, there  
10 has to be a notice given that there's some type of  
11 termination. But the only one to give that notice -- well,  
12 the witnesses didn't even know who gives the notice. It  
13 seems to be that the debtor would have to give a notice --

14 THE COURT: Well, but we're at the point where  
15 they will give the notice because the plan is going to be  
16 confirmed and those entities will not have their claims  
17 anymore.

18 MR. WANDER: Well, and then the \$100 million has  
19 now been disbursed. So if Your Honor confirms this plan,  
20 then it's 200 -- and in round numbers, Judge, it's 250  
21 million to the professionals, and it's zero --

22 THE COURT: No, no, it's not 100. It's 50.

23 MR. WANDER: In the carve-out, but you're also  
24 taking another 25 million --

25 THE COURT: But that's for the future. That's to

1 litigate with.

2 MR. WANDER: Again, that's -- and by the way, part  
3 of the litigation is against the administrative creditors.  
4 So if you have an allowed administrative claim, because you  
5 gave goods and services to the debtor, even during the  
6 bankruptcy. I'm not talking about (indiscernible) or  
7 anything, there are people who provided goods and services  
8 during the bankruptcy. They have not been paid.

9 So -- and now, some of them is subject to  
10 objections and preference claims.

11 THE COURT: That's how it works. You know,  
12 there's nothing wrong with --

13 MR. WANDER: So --

14 THE COURT: It's just a -- preferences are not  
15 immoral on either side. This is how the code is written.  
16 Look, I'm sorry, you can't just sort of come up here and  
17 give me sort of general notions about fairness without  
18 actually looking at the parties' underlying rights.

19 Now, it may be that there is some argument to be  
20 made on your -- on the first point that I raised, which is  
21 in any situation like this, there's usually a negotiation,  
22 because no one really wants the case to convert. And so  
23 parties focus on that. And sometimes people give on their  
24 rights just to defer.

25 But these other points are just points that I

1 think probably just confuse people and make them think that  
2 they have rights when they don't have rights. And that's a  
3 disservice to them.

4 MR. WANDER: Well, Judge --

5 THE COURT: You know, you don't have a right not  
6 to be sued for a preference.

7 MR. WANDER: I'm not saying that, Judge.

8 THE COURT: Well, I think you were. I think you  
9 were saying it's really bad that these people might be sued  
10 for a preference. Well, too bad. You know, it's in the  
11 code. So what do you say? Obviously, they don't like it,  
12 but it's perfectly fine for them to be sued if you satisfy  
13 Rule 11 and there's a rational basis that you could recover.  
14 There's nothing wrong with that.

15 MR. WANDER: I wasn't --

16 THE COURT: I just -- you know, and --

17 MR. WANDER: I wasn't saying there's something --

18 THE COURT: And there's nothing wrong with relying  
19 on a final order that says that this money will be held in  
20 trust and no one else can get it. And I'd like to focus on  
21 that language. If there's something I'm missing, you should  
22 tell me about it, but --

23 MR. WANDER: I was --

24 THE COURT: -- paragraph 21 of the DIP order sets  
25 out this carve-out reserve, a carve-out account, and it says

1 that it'll be held in trust and notwithstanding anything to  
2 the contrary in this or any other Court order, the carve-out  
3 account in the amounts on deposit or the carve-out account  
4 shall be available and used only to satisfy obligations of  
5 professional persons benefiting from the carve-out. How do  
6 you get around that?

7 MR. WANDER: I'll tell you how, Your Honor. If at  
8 the beginning of the case you were told that --

9 THE COURT: So you're saying the order was fraud?  
10 There was fraud on the Court?

11 MR. WANDER: That's not what I said.

12 THE COURT: Well, okay. So then I'm not going to  
13 relive history. The order is what it is.

14 MR. WANDER: I'm trying to address.

15 THE COURT: All right.

16 MR. WANDER: I'm trying to answer Your Honor's  
17 question.

18 THE COURT: Okay. All right. It was odd that  
19 you'd say if I was told at the beginning of the case,  
20 because we're not there anymore. We're here.

21 MR. WANDER: Right. And what I was -- what I'm  
22 saying, Your Honor, is -- and hindsight is 20/20. And  
23 Courts sometimes can revisit orders. If Your Honor --

24 THE COURT: On what basis?

25 MR. WANDER: Your Honor -- if it was told at the



1 beginning of the case that we may end up with a huge hole in  
2 paying administrative creditors during the case their  
3 allowed claims, I submit Your Honor might rethink whether  
4 the \$50 million that's in this carve-out --

5 THE COURT: I would rethink under Rule 9024,  
6 right? So what are the grounds under Rule 9024 to vacate  
7 that order, which adopts Rule 60 of the civil rules?

8 MR. WANDER: Your Honor, at the time it was  
9 entered, administrative creditors were not being told they  
10 weren't going to be paid.

11 THE COURT: But they weren't told they weren't. I  
12 just -- Mr. Wander, this isn't -- this is -- I don't believe  
13 this is productive. Let's go through Rule 9024 together.  
14 Why don't we do that? Mistake, inadvertent surprise, or  
15 inexcusable neglect. I'm sorry. Is that what you'd be  
16 relying on? Mistake, inadvertent surprise, or inexcusable  
17 neglect?

18 MR. WANDER: Well, mature --

19 THE COURT: Newly discovered evidence that with  
20 reasonable diligence could not have been discovered in time  
21 to move for a new trial, fraud.

22 MR. WANDER: Well, Judge --

23 THE COURT: Judgment is void, the judgment has  
24 been satisfied.

25 MR. WANDER: Your Honor, it's sure surprising

1 right now that we have a hole of over \$100 million of  
2 administrative insolvency. I'm just telling Your Honor --

3 THE COURT: But the point of a carve-out is to  
4 deal with that issue. I think it contemplates. There's no  
5 reason to have a carve-out other than if you're worried  
6 about that very issue. So if anyone was worried about it,  
7 they could've stood up and said, "For example, you know,  
8 this isn't the type of carve-out you should be granting,  
9 Judge. Instead, it should be a 506(c) carve-out. So in  
10 fact, some amount of the expenses should actually be  
11 deducted from the secured creditor's claim."

12 MR. WANDER: And --

13 THE COURT: You know, things like that. But to  
14 say that this order should be vacated based on the now  
15 reality of what was then the possibility for which the  
16 carve-out was expressly negotiated, which in the event of an  
17 administrative insolvency or the risk of that, this doesn't  
18 seem to make a lot of sense to me.

19 MR. WANDER: Well, here, Your Honor, and I don't  
20 know if this rises to fraud, but it may get close to it is  
21 if the debtor filed a motion in the beginning of the case  
22 and said to \$162 million of vendors, "We're going to pay you  
23 those claims," those vendors have no reason to object to --

24 THE COURT: Well, look --

25 MR. WANDER: -- any type --

1 THE COURT: -- I'm going to cut this off right  
2 here. In your objection and in the record today, there has  
3 been no attempt to make any effort to vacate that order in  
4 any respect. So to me, this is just not germane. Why are  
5 we even dealing with this? If you really seriously felt  
6 this, it should be in the pleadings --

7 MR. WANDER: Judge --

8 THE COURT: -- or in the record.

9 MR. WANDER: Judge, we -- objections have been  
10 filed on the fee issue --

11 THE COURT: You said the creditors should give up  
12 their rights. That's what you have said. They should give  
13 up their rights under the DIP order and --

14 MR. WANDER: No, I'm --

15 THE COURT: -- without a basis for it.

16 MR. WANDER: What I'm saying is there should be a  
17 balancing. Why should the administrative vendors --

18 THE COURT: That's a separate issue. That's an  
19 equitable issue. That's the negotiations.

20 MR. WANDER: Correct.

21 THE COURT: That's not a legal issue.

22 MR. WANDER: So as an equitable issue where we are  
23 today, when you have 162 million --

24 THE COURT: All right. So you're just basically  
25 negotiating in the open on this, right? Because that's all

1 we're talking about is the negotiation over it.

2 MR. WANDER: No --

3 THE COURT: So what -- in your mind, what would it  
4 take? To give up all the money? I mean, what -- there's --  
5 it just doesn't --

6 MR. WANDER: No, I wasn't talking about giving up.  
7 I'm not saying the 80 percent, the 150 million they've  
8 received they should give up. I did not say that, Your  
9 Honor. I am not saying that.

10 THE COURT: But you --

11 MR. WANDER: I'm talking --

12 THE COURT: But you're basically just negotiating  
13 right now, right? That's really what's going on.

14 MR. WANDER: No, I'm saying what's wrong --

15 THE COURT: So what's the legal basis for the  
16 argument?

17 MR. WANDER: I'm saying what's wrong with this  
18 plan is there is \$100 million of cash. That's what I'm  
19 saying, number one. While I do not think a conversion is a  
20 great result, for administrative creditors under this plan,  
21 a conversion to a Chapter 7, where the trustee has \$100  
22 million and can pursue all of the litigation to bring in the  
23 additional assets, which will probably take several years,  
24 very likely could be better for the administrative  
25 creditors, particularly the ones of the K-Mart estate.

1 THE COURT: I'm sorry, what is the difference  
2 between having 100 million and 25 million? I mean, it's a  
3 big litigation budget, 100 million.

4 MR. WANDER: No. What I'm saying is the trustee  
5 can distribute those funds. Instead of the hundred -- would  
6 it hurt the professionals if it got converted? Yes. They  
7 don't get necessarily the 20 percent holdback. Would it be  
8 good for other creditors if a trustee was able to distribute  
9 that \$50 million? Yes. It might be good, and better, for  
10 administrative creditors, particularly of the K-Mart estate  
11 --

12 THE COURT: Have you made that case anywhere to me  
13 as to how that works? I mean, the debtor had laid out  
14 pretty carefully in their liquidation analysis the argument  
15 that at least most of the administrative expense creditors,  
16 particularly after you factor in not only the cost of coming  
17 up to speed by a Chapter 7 trustee, as well as the Chapter 7  
18 trustee administrative expenses, including the cost of the  
19 trustee herself, the cost of going through all of the  
20 accompanying claims and litigating those issues, they make a  
21 pretty compelling case that whereas on the evidence before  
22 me, whether you accept the claims program or you wait until  
23 the effective date and get paid in full, you will get paid  
24 in full.

25 So I think what you're saying to me is that you'll

1 get some more money now and maybe not get paid in full. At  
2 least that's what their Chapter 11 analysis shows me.

3 MR. WANDER: Well, actually what --

4 THE COURT: Can you point to something that shows  
5 different?

6 MR. WANDER: I think what their Chapter 7 analysis  
7 shows, and what the creditor's committee argued before they  
8 made their deal, was the K-Mart estate is the ones who would  
9 probably get 100 cents. So administrative creditors in the  
10 K-Mart estate, in a Chapter 7, probably would get 100 cents  
11 on the dollar. That's what I believe their liquidation now  
12 shows.

13 THE COURT: When?

14 MR. WANDER: What?

15 THE COURT: When?

16 MR. WANDER: Okay, so when? So when will the plan  
17 go effective based on the testimony? Now --

18 THE COURT: No -- well, let's put it differently.  
19 Almost by definition, the plan would go effective before  
20 there would be a distribution in a Chapter 7 case, right?

21 MR. WANDER: No. There could be in term  
22 distributions, a Chapter 7 trustee can pay undisputed  
23 allowed claims with an order from Your Honor --

24 THE COURT: From what source, given the  
25 intercompany claim analysis that would have to take place?

1 MR. WANDER: I don't believe there's any bar in a  
2 Chapter 7 trustee distributing --

3 THE COURT: That wasn't my question. If you  
4 really don't know what the intercompany claims are,  
5 including secured claims, how do you make an interim  
6 distribution? What trustee would do that?

7 MR. WANDER: They --

8 THE COURT: For the risks that she would face?

9 MR. WANDER: Well, I believe we -- based upon what  
10 the committee has set forth, and the debtor's liquidation  
11 analysis, I believe the K-Mart estate is administratively  
12 solvent.

13 THE COURT: But their --

14 MR. WANDER: And it may hurt other administrative  
15 creditors --

16 THE COURT: But you're not focusing on the  
17 intercompany claims, of which under the DIP order they are  
18 secured and superpriority claims, so --

19 MR. WANDER: I am. I'm saying the funds would be  
20 going to the K-Mart estate, based upon the disclosure  
21 statement, the K-Mart estate is the one where all the money  
22 would go to. If you're an administrative creditor, and I'm  
23 sure there are some who have claims against K-Mart but not  
24 Sears. Some like my clients have claims against both.  
25 Their claims could be paid very quickly, 100 cents in the K-

1 Mart estate by the Chapter 7 trustee, there doesn't seem to  
2 be any dispute of the papers filed with the disclosure  
3 statement and the committee's filings that the K-Mart estate  
4 is the solvent one.

5 So yes, in a Chapter 7, administrative creditors  
6 for the K-Mart --

7 THE COURT: Is there a dispute on that? And if  
8 there isn't, is it solvent all the way after doing the  
9 intercompany claims reconciliation analysis?

10 MR. WANDER: I --

11 THE COURT: No, I'm asking counsel for the company  
12 and the committee.

13 MR. SINGH: Your Honor, Sunny Singh for the  
14 debtors. We don't necessarily think -- there is a dispute  
15 on that because we don't necessarily think that K-Mart would  
16 absolutely be administratively solvent. If you take the  
17 post-petition intercompany analysis that we were able to do,  
18 yes, K-Mart is entitled to those intercompany claims. But  
19 we believe, as we've assumed in our liquidation analysis,  
20 that there would be inter-estate liquidation. And after  
21 that, it's unclear how much K-Mart would recover, but --

22 THE COURT: There would be what? Inter what?

23 MR. SINGH: Excuse me, litigation. I used the  
24 wrong word. Inter-estate litigation between the three to  
25 say there should be substantive consolidation or there



1 should not be substantive consolidation. And after that,  
2 we're not saying that K-Mart is absolutely administratively  
3 solvent in a hypothetical liquidation scenario. What we're  
4 saying is it's pretty clear that only K-Mart would be able  
5 to pay something to administrative creditors in that  
6 scenario.

7 MR. WANDER: So in that situation, a trustee could  
8 distribute an interim distribution of 50 cents. It may not  
9 be the 100 cents. I understand what he just said. But  
10 that's the solvent estate.

11 So K-Mart administrative creditors very likely  
12 would do better in a Chapter 7. But let me talk about --

13 THE COURT: I don't -- I guess I don't agree with  
14 that, based on the evidence I've actually had. And just  
15 saying he -- she could make a 50 cent distribution.  
16 Trustees are very conservative people. They face liability  
17 for letting money go out too early. If they're being sued  
18 by the Mr. Foxes of the world, no offense, that all these  
19 other companies have claims against them, they're not going  
20 to make it into a distribution. They're going to have that  
21 litigation play out.

22 MR. WANDER: You'll still probably have that  
23 resolved as soon as this plan will go effective. And let me  
24 just deal with the --

25 THE COURT: I disagree with that completely.

1 MR. WANDER: But let me deal with that issue, Your  
2 Honor. Because we have the testimony of the three witnesses  
3 --

4 THE COURT: And the -- I'm sorry, the  
5 administrative claims would include the professionals claims  
6 that you say wouldn't get paid. They would be part of that.

7 MR. WANDER: Right. But they wouldn't be able to  
8 get additional distribution until the other administrative  
9 creditors caught up. So okay, they would get 80 cents.  
10 They may not get 100 cents, but the professionals, I don't  
11 believe we're getting more --

12 THE COURT: Caught up on what?

13 MR. WANDER: If you're an administrative creditor  
14 of K-Mart and you've gotten zero so far and the  
15 professionals have gotten 80 cents, then I believe the  
16 administrative creditors with allowed claims would be  
17 entitled to get 80 percent because it would go pro rata --

18 THE COURT: I don't understand that argument  
19 either. They've been paid under the order that says that  
20 it's going to them and only to them.

21 MR. WANDER: Correct.

22 THE COURT: So it --

23 MR. WANDER: So I'm saying the additional money,  
24 the \$50 million carve-out in the Chapter 7 would go to the  
25 Chapter 7 trustee.

1 THE COURT: To go to admin expenses.

2 MR. WANDER: Correct.

3 THE COURT: So it existed at that time.

4 MR. WANDER: And --

5 THE COURT: Why would you have a lookback? Again,  
6 you're just ignoring the order. This is the difference  
7 between equities and a negotiation on the one side and legal  
8 claims and rights on the other. You know, at some point  
9 when you're negotiating, you've got to face reality.

10 MR. WANDER: I understand, Your Honor, but if the  
11 bankruptcy code says that administrative creditors are  
12 supposed to be paid in the ordinary course, I think there's  
13 something inherently wrong --

14 THE COURT: No, no, I'm not talking about  
15 inherently wrong. I'm talking about rights under a specific  
16 order and specific provisions of the code. So let's just  
17 move off of inherently wrong or inequitable.

18 MR. WANDER: Okay. So let me talk about some of  
19 the testimony, because when we had chambers -- a few  
20 chambers conference ago and it was brought up that it may  
21 take a while for this plan to be effective, I think -- and I  
22 pointed out, we may be talking years, I think Your Honor had  
23 a reaction of, "I'm not confirming a plan that may not go  
24 effective for years."

25 I believe -- I'm not saying a chambers conference

1 is binding, I'm just setting the stage for the testimony.  
2 The testimony, Mr. Schrock said no one poked holes in it. I  
3 respectfully disagree. I think I poked the Grand Canyon in  
4 it. These people have no basis for the numbers coming in,  
5 the numbers going out.

6 THE COURT: I don't agree with that.

7 MR. WANDER: Meaning the claims and the assets.

8 THE COURT: Look, are we talking about feasibility  
9 now?

10 MR. WANDER: Yes.

11 THE COURT: Because I think that's what we are  
12 talking about it.

13 MR. WANDER: Yes.

14 THE COURT: So why is this a "visionary scheme,"  
15 which seems to be the one phrase that all courts that deal  
16 with 1129 (a)(11) find is something that is not feasible?  
17 Why is this a visionary scheme?

18 MR. WANDER: Well, the question right now is when  
19 will it be feasible? So I submit this plan, based upon the  
20 testimony of billions -- hundreds of millions, and maybe --  
21 you know, I use the word billions, you know, not too loosely  
22 because, you know, one billion two is a lot. Most of the  
23 claims haven't been filed. None of them have been  
24 litigated. There are serious legal issues. There are  
25 serious factual issues. My client has an inducement claim.

1 I haven't even been able to get going with discovery.

2 You're talking about years of litigation on the  
3 administrative claims. So if the -- it will be years for  
4 money to come in based upon preference recoveries, likely  
5 with the ESO litigation. So it'll be years for the  
6 preference recoveries and the funds to come in to pay  
7 administrative claims. It'll take years to determine the  
8 universe of the administrative claims.

9 So we have a plan that may be effective in easily  
10 three years. And between that time, you are simply going to  
11 have more of the funds being used on litigation against the  
12 administrative --

13 THE COURT: When would they not be used in a  
14 conversion? Same funds would be used, right?

15 MR. WANDER: I think a Chapter 7 trustee is going  
16 to be less likely to have the litigation against the  
17 administrative creditors. Yes, we want the --

18 THE COURT: What's that -- why? What's that based  
19 on?

20 MR. WANDER: Because -- I'll tell you why. A  
21 Chapter 7 trustee is going to have fiduciary duties to  
22 everyone. And he probably is going to look at the  
23 administrative creditors differently than the lawyers for  
24 the creditors committee. See, if you're under -- the lawyer  
25 for the creditors committee and the liquidating trust, every

1 dollar you give to the administrative creditors is one less  
2 dollar to the unsecured creditors. I get that. That's who  
3 they represent.

4 If you're a trustee, you're not representing the  
5 unsecured creditors.

6 THE COURT: The litigation group is not the  
7 creditors committee.

8 MR. WANDER: Okay. So the -- they fought over who  
9 would control it, and the creditors committee won. They get  
10 the three votes versus the tooth of the debtor. And there  
11 was a big brouhaha --

12 THE COURT: And you have the --

13 MR. WANDER: Let's see --

14 THE COURT: -- consenting admin creditor  
15 representative.

16 MR. WANDER: I'm sorry?

17 THE COURT: You have the consenting admin creditor  
18 representative, and you need the unanimity on expending  
19 extra money. And if you don't have it, you come back to me.

20 MR. WANDER: Okay. So --

21 THE COURT: So you have three versus two to begin  
22 with, in terms of numbers, as far as committee and other  
23 fiduciaries. I just --

24 MR. WANDER: What I was saying -- I was trying to  
25 explain the dynamics --

1 THE COURT: I know, but I'm reacting to that by  
2 saying I don't see the dynamics the way you do, given where  
3 we are at this moment.

4 MR. WANDER: Well, first of all, because there's  
5 an -- the administrative creditors, the two groups, were  
6 aligned up to a point. It's natural at a certain point they  
7 would not be aligned because if you're claims traders and  
8 you don't have the world imports issue --

9 THE COURT: That issue can be decided quite  
10 quickly. It's a pure legal issue. To some extent, I've  
11 already dealt with it. It's just -- you know, that's just  
12 not -- no trustee would just give up on that issue.

13 MR. WANDER: I'm not saying a trustee would give  
14 up. I'm saying --

15 THE COURT: Well, so that's fine, but --

16 MR. WANDER: No. A trustee would look at it  
17 differently. He would not look at --

18 THE COURT: A trustee would, I think, actually in  
19 a case of this magnitude, be very reluctant to settle that  
20 issue. It would be a brave trustee that would settle it,  
21 particularly in a settlement that was favorable on the side  
22 that I think you wouldn't want to come out on. It's just --  
23 you know, it's not --

24 MR. WANDER: Your Honor, fine. I make that point  
25 -- I don't believe if you don't confirm the plan today, I

1 don't think the world comes to an end. I don't believe the  
2 only alternative is conversion.

3 What's happened here is everything is being pushed  
4 based upon can we pay the lawyers for another week. And --

5 THE COURT: Where's that in the record?

6 MR. WANDER: Well, Judge, if we just had a --

7 THE COURT: The lawyers are going to get -- I  
8 mean, lawyers will be incurring the funds to do the work  
9 that you acknowledge needs to get done no matter what.

10 MR. WANDER: Okay. So if we just had an  
11 administrative claims settlement construct less than 48  
12 hours ago, it has an automatic opt in. And I would say if  
13 there's one thing I would request that Your Honor change, is  
14 not to have the automatic opt in. It's patently unfair to  
15 foreign vendors. You have people in Asia, other places who  
16 are the main suppliers. They don't have lawyers. They're  
17 not going to understand what the notice is.

18 It's unfair and I submit as the U.S. Trustee's  
19 Office in their objection said, "Contrary to the bankruptcy  
20 code, to have them -- by doing nothing, automatically not  
21 getting 100 cents and getting a" --

22 THE COURT: That's not how this -- that's not what  
23 this settlement provides for.

24 MR. WANDER: I believe --

25 THE COURT: I'm sorry. I'm sorry. We're talking



1 about the deemed opt ins where they --

2 MR. WANDER: Right. It's --

3 THE COURT: -- were deemed to agree to 75 percent.

4 MR. WANDER: Yeah. If there's just one thing that  
5 I submit should be --

6 THE COURT: All right. Although you're doing that  
7 for someone other than your client, right? Because your  
8 client knows how to read and they've hired you, so that's  
9 really just --

10 MR. WANDER: Correct. I'm saying --

11 THE COURT: Okay.

12 MR. WANDER: -- they're a lot -- I'm saying based  
13 upon my discussions with a lot of --

14 THE COURT: You know, let's -- I don't need to  
15 hear from you on this point. You don't have standing on  
16 that point.

17 MR. WANDER: I may not have -- well, Your Honor --

18 THE COURT: You don't. You don't have standing on  
19 that point. You're pleading the cause of someone that you  
20 don't represent.

21 MR. WANDER: Who doesn't have a lawyer, who --

22 THE COURT: Fine. I get that. I've already taken  
23 that into account. But you don't have standing on it.

24 MR. WANDER: Your Honor, if you -- if Your Honor  
25 doesn't confirm the plan today, I don't believe that means

1 things go into a Chapter 7 conversion.

2 THE COURT: No, I'm sure it wouldn't because  
3 people would then negotiate more and that's what you want.  
4 You want to negotiate. But I have no confidence that your  
5 clients or you would ever agree to anything that actually is  
6 reasonable.

7 MR. WANDER: Well, I don't think that's a fair  
8 comment, Your Honor.

9 THE COURT: Well, you've just said that the  
10 professionals should give up \$50 million. That makes no  
11 sense. I mean, I wouldn't if I were them. I have better  
12 rights than that. They might be persuaded to give up  
13 something more, but not that.

14 MR. WANDER: Your Honor --

15 THE COURT: So I would suggest that maybe you make  
16 a reasonable proposal to them on that score.

17 MR. WANDER: Your Honor, I respectfully disagree  
18 as to that --

19 THE COURT: Well, I was giving you a chance to  
20 actually get some money in. But if you're not willing to  
21 take it, then that's fine.

22 MR. WANDER: Your Honor, as I said, we lost our  
23 seat at the table --

24 THE COURT: No, Mr. -- Mr. Wander, listen to me  
25 carefully. I'm giving you a chance to get something more.

1 Just telling you that what you are asking for is  
2 unreasonable. Listen to what I am saying. You won't have  
3 this chance for very long. I'm suggesting we maybe take a  
4 break and talk to them about it.

5 MR. WANDER: Well, so, Judge, you brought that up.  
6 So yesterday, the debtor reached out to me --

7 THE COURT: No, no, I --

8 MR. WANDER: Okay.

9 THE COURT: Hold on. That's -- I'm saying that to  
10 you. You should finish the rest of your argument, all  
11 right?

12 MR. WANDER: Your Honor, sure. I don't believe  
13 that the debtor has met its burden. I don't believe that  
14 the testimony by the witnesses was credible. I don't  
15 believe --

16 THE COURT: But why?

17 MR. WANDER: I'll tell you why, because they  
18 haven't factored in the length of time it will take for the  
19 funds to come in under any realistic scenario with hundreds,  
20 if not thousands of claim objections --

21 THE COURT: Right. But can we stop there? If  
22 it's a time argument. Again, I have two sections of the  
23 code, right? 1129(a)(9), which is the section that requires  
24 unless otherwise agreed, that administrative expense claims  
25 be allowed on the effective date. Or if they're not -- if

1 they're objected to then as soon as they're allowed. And  
2 then I have 1129(a)(11), which is the feasibility section.  
3 As far as (a)(9) is concerned, there's nothing in the code  
4 or the case law that says that a plan has to go effective by  
5 a date certain, some specific date. So time isn't really  
6 relevant to (a)(9). It is relevant to (a)(11) but not to  
7 (a)(9).

8 So unless you can point to me for something, I'm  
9 going to move to (a)(11). I don't see it as relevant to  
10 (a)(9). It's not there.

11 MR. WANDER: Your Honor, most --

12 THE COURT: Congress could have easily said, "But  
13 in no event shall the effective date be later than X, or  
14 later than Y if it's conditioned upon regulatory approval,"  
15 or something like that.

16 MR. WANDER: Right. And Your Honor mentioned that  
17 example of regulatory approval. And very often, we need a  
18 third party to approve, so we can't go effective for that  
19 reason.

20 THE COURT: Congress doesn't limit it that way.

21 MR. WANDER: I understand. But I don't believe  
22 the case law supports extending the effective date four  
23 years --

24 THE COURT: What --

25 MR. WANDER: -- simply to have litigation

1 recoveries.

2 THE COURT: Give me a case. Give me a case.

3 MR. WANDER: I don't have one offhand.

4 THE COURT: All right. So let's move to  
5 feasibility, because that's --

6 MR. WANDER: Sure.

7 THE COURT: -- I think, the relevant issue.

8 MR. WANDER: Okay.

9 THE COURT: Feasibility. I can't confirm a plan  
10 that fails the feasibility test. And generally speaking,  
11 what the courts turn to is, is the plan premised on  
12 visionary schemes or unduly risky or unreasonable or  
13 improbable assumptions, including litigation assumptions,  
14 although it doesn't have to be limited to litigation. It  
15 could be the hockey stick projection.

16 Unlike the cases that the parties have cited that  
17 dealt with litigation that was highly improbable, including  
18 one litigation that the party had already lost and had on  
19 appeal, the litigation we're talking about here is in two  
20 forms, as far as bringing assets into the estate. Form one  
21 is preference litigation. As far as I'm concerned, I have  
22 uncontroverted evidence that there is a more than reasonable  
23 likelihood that there will be at least 100 million in  
24 preference recoveries where the estimate is that that's  
25 about 10 or 15 percent of what was determined to be, you

1 know, subject to demand.

2 In my experience in dealing with preference cases,  
3 10 or 15 percent is a pretty good estimate when you look at  
4 the whole ball of wax of demands. It's also my experience  
5 that those cases are hardly ever litigated beyond the  
6 complaint stage. Every now and then you get to a motion for  
7 summary judgment and generally speaking, because there are  
8 serious factual issues usually. If it's gone that long,  
9 that's denied, and then the parties settle.

10 This is not just my experience. This is the  
11 experience in case after case, where there are thousands of  
12 potential litigation preference claims. And then when you  
13 go to the ESL litigation, this is something that extremely  
14 well-informed parties on the creditors committee's side, and  
15 the debtor's side through the special committee, looked at  
16 extensively and took into account when negotiating the  
17 transformed deal. And they -- the one thing they insisted  
18 on is that those claims not be released.

19 And based on my review of the complaint and the  
20 summary of those claims, they are real claims. They are not  
21 visionary schemes. So what is not feasible here in terms of  
22 actually achieving the effective date?

23 MR. WANDER: Sure. So I fully support the estate  
24 going after ESL and Mr. Lamper (ph). I'm all for that,  
25 Judge. What they believe those who've analyzed it, what

1 they believe would likely be recovered is a separate issue.  
2 Now, I'm not saying you don't do the litigation, because  
3 instead of 2 billion, you're only going to recover 50  
4 million or 150 million, hey go sue them. Prosecute the  
5 lawsuit. Bring in the 150 million.

6 But there's nothing in the record that can give  
7 the Court any comfort as to what that number will be and  
8 when it will be achieved.

9 THE COURT: Does that mean the ultimate  
10 collection?

11 MR. WANDER: Correct. Correct.

12 THE COURT: Okay.

13 MR. WANDER: The amount and the collectability are  
14 two issues that I'm told --

15 THE COURT: Well, as far as the amount, I have the  
16 complaint and I have the analysis of the transfers that are  
17 being attacked. So that is in the record.

18 MR. WANDER: There's the complaint. I'm not --

19 THE COURT: And there's this summary of the  
20 transfers that are the subject of the complaint.

21 MR. WANDER: Right, but I believe a summary of the  
22 transfers doesn't set forth whatever the defenses are going  
23 to be. It says --

24 THE COURT: Look, I have been reviewing litigation  
25 claims since 1984. I can do that, particularly when I know

1 that two extremely experienced litigation firms have done it  
2 also and have said, "Over my dead body will these claims be  
3 settled in the transform negotiations."

4 MR. WANDER: Right. And I --

5 THE COURT: I understand their collectability  
6 point, but that's, you know --

7 MR. WANDER: Well, let's talk about that. So  
8 first of all, I was fully supportive of the --

9 THE COURT: I don't care whether you're fully  
10 supportive. I just -- look --

11 MR. WANDER: Not giving a release was one thing.  
12 I agree. They shouldn't have given the release. I'm glad  
13 they held out. It's a separate thing as to how much are we  
14 going to collect.

15 THE COURT: Right.

16 MR. WANDER: That's what I'm saying. I'm saying  
17 the evidence --

18 THE COURT: You don't need a lot here. You really  
19 don't need a lot. The shortfall is somewhere between 35 and  
20 \$100 million.

21 MR. WANDER: Well, I submit based upon the  
22 testimony that's not correct. And I don't believe they  
23 really established it. When I asked them about the various  
24 claims, the witnesses really didn't know much about it.  
25 They don't even know about the \$162 million that was



1 promised to the vendors. I've asked I don't know how many -  
2 - how much has been paid. Judge, it could be 162 million  
3 that should be added. It could be \$1. But they did not  
4 know. That's my point.

5 When I asked them about all the claim objections,  
6 how can you assume you're winning everything? I understand  
7 what Your Honor's comments were at the May 21 hearing on the  
8 world imports, but they don't know. They have no idea how  
9 that litigation will pan out.

10 THE COURT: Well, I do. I mean, come on. Look,  
11 as far as the claim objections, every single big case -- I  
12 mean, as far as -- most of the claims that are being  
13 objected to in those charts are duplicates or in connection  
14 with priority claims. People who think priority -- I might  
15 as well check that box because it's really important to me.  
16 That's not what priority claim really means under 507.

17 MR. WANDER: I'm not dealing with the -- I didn't  
18 attack their --

19 THE COURT: Well, you did a bit --

20 MR. WANDER: No, no, no --

21 THE COURT: -- until I -- anyway. In any event, I  
22 just -- look --

23 MR. WANDER: I'm talking about the testimony.  
24 That's what I'm talking about, Judge. I'm talking about the  
25 record before the Court.

1 THE COURT: I understand, but as far as the claims  
2 that they're talking about, and I bumped -- you heard me say  
3 it. I bumped it up from the 35 to, you know, over 100. And  
4 I think that swing takes into account the potential that  
5 some of these claim objections may raise issues that are not  
6 -- no brainers, that the people won't just default, which is  
7 what happens with about 99 percent of omnibus claim  
8 objections, and they'll actually litigate them.

9 But to say that it's just out -- you know, I  
10 should just disregard the testimony, I don't have a basis  
11 for that.

12 MR. WANDER: No. I'm talking about the testimony.  
13 I had no problem with them knocking off \$1 billion from a  
14 roughly a billion two in the administrative claims. I  
15 didn't challenge that. They're smart enough to know what a  
16 duplicate claim is. I get that.

17 I was talking about when they got it down to 200  
18 million, I'm basically saying, "You're at 200 million.  
19 You're not at 30. You're not at 60. You're not at 90."

20 THE COURT: So 30 is the shortfall. That's the  
21 low end of the shortfall, 35 million. And the high end is -  
22 - so --

23 MR. WANDER: I'm talking about the record.

24 THE COURT: I agree. I understand.

25 MR. WANDER: I'm talking about the testimony.

1 THE COURT: No, but I'm doing -- I'm going through  
2 that and I'm saying to you that I'm not necessarily  
3 accepting that the shortfall here is \$35 million based on  
4 their estimate of 50 million of allowed administrative  
5 expenses, and 90 million that will net out to zero with the  
6 section 2 -- asset purchase agreement, but that it could be  
7 well higher. There could be another easily 70 million here.

8 MR. WANDER: Or it could be another 100 million --

9 THE COURT: No. Well, another 100 million on top  
10 of the 100?

11 MR. WANDER: Yeah. I'll tell you why.

12 THE COURT: All right.

13 MR. WANDER: If I may.

14 THE COURT: It would be 270 million.

15 MR. WANDER: If I may.

16 THE COURT: All right.

17 MR. WANDER: And again, it's their burden to  
18 satisfy. So let me tell you the numbers.

19 THE COURT: All right.

20 MR. WANDER: Okay. 162 million of vendor claims  
21 that they said they would pay, prepetition orders, post-  
22 petition delivery. It's in their motion. If they didn't  
23 pay it, that's \$162 million of potential more administrative  
24 claims.

25 THE COURT: Well, the big word is potential,

1 because then you have to show a lot of other facts,  
2 including that they -- people actually relied on that in  
3 making deliveries, and that they didn't pay --

4 MR. WANDER: No, that's a different claim. I'm  
5 not up to that. That's the inducement claim. I'm talking  
6 about their motion where they said to Your Honor in the  
7 papers that, "We have \$162 million of goods in transit. And  
8 if we don't give the vendors the comfort of the  
9 administrative claim, they will demand that we reissue" --

10 THE COURT: I'm going to stop you right there.  
11 The authority I gave was authorization to make the payment.  
12 I didn't direct them to make the payment. So it is an  
13 inducement claim. So let's move on from that.

14 MR. WANDER: Okay. So there's 162 --

15 THE COURT: Outside, the outside amounts.

16 MR. WANDER: Right.

17 THE COURT: Well, so --

18 MR. WANDER: And so I asked them --

19 THE COURT: But you've got to discount that.

20 MR. WANDER: But they don't know how many of them  
21 have been paid. It's their burden. So that's the first  
22 number, Judge.

23 THE COURT: Okay.

24 MR. WANDER: It's their burden.

25 THE COURT: Right.

1 MR. WANDER: And I asked them about it. They  
2 didn't even know about the issue.

3 THE COURT: But the issue is a specific factual  
4 issue, which is who -- it's not a basis for an objection to  
5 claims.

6 MR. WANDER: They haven't factored it into their  
7 analysis.

8 THE COURT: No, but they have looked at the claims  
9 that were filed, all right? And you'd think that if someone  
10 really believed that they were defrauded, they would file a  
11 claim on that basis. So they looked at the claims that were  
12 filed and they looked at their accounts payable.

13 So the analysis you're asking them to make isn't  
14 an analysis that they should be making at this point.

15 MR. WANDER: Yes. They could've --

16 THE COURT: Look, we're going to move on from  
17 this.

18 MR. WANDER: Okay.

19 THE COURT: I'm just -- sorry, Mr. Wander. This  
20 is --

21 MR. WANDER: Well, Your Honor, the -- it gets back  
22 to the administrative bar order.

23 THE COURT: No, it -- I'm sorry. There's no  
24 reason to have an administrative bar order.

25 MR. WANDER: It's in the plan.

1 THE COURT: I've already found that. There's no  
2 need to have an administrative claims bar order here.

3 MR. WANDER: I'm just saying it's in the plan.  
4 It's just to the record in Section 1.2. I'm looking at  
5 document 5293, filed October 1, 2019, in the definition  
6 section of 1.12. It's administrative expense claims bar  
7 date, means the date fixed by the Bankruptcy Court as the  
8 deadline to file administrative expense claims, et cetera.

9 THE COURT: And I haven't fixed on. And I see no  
10 reason to fix one.

11 MR. WANDER: Your Honor, I'd submit, based upon  
12 the record, this plan will likely not go effective at the  
13 least, for several years, if at all. I think that based on  
14 the testimony -- and they have the burden -- the witnesses  
15 did not have a good handle on the claims against the estate.  
16 They assume all of the objections, the reclassifications.  
17 They win on every issue, and there are no orders disallowing  
18 the claims.

19 They made a deal -- an issue in addressing an  
20 objection by, I think, Transform ESL, where they're not  
21 counting their claims in 507(b) because they said, We have  
22 an order disallowing it. So, those claims are not in the  
23 analysis.

24 Well, we can't say that to them and then say are,  
25 We don't have orders on all of these claim objections, but

1 we're going to give you everything that we've objected to  
2 and that we're thinking of objecting to, and we're assuming  
3 the money is gone --

4 THE COURT: But I just told you, I'm adding on  
5 more money to that number, and they have added to it just  
6 for that very reason.

7 MR. WANDER: And I think that based the -- based  
8 upon the testimony, that there's no way of knowing within a  
9 hundred million dollars of what that number is. Based on  
10 the record, based upon what the witnesses have said.

11 THE COURT: I have a slightly lower number. I put  
12 another 70 on it. And you're putting, I guess, 170 on it.

13 MR. WANDER: Because there are hundreds of  
14 millions of dollars of claims that haven't even been filed,  
15 and so --

16 THE COURT: Now, let's just stop right there.  
17 They're counting the accounts payable. What other claims  
18 are you talking about?

19 MR. WANDER: Judge --

20 THE COURT: They have their records of who their  
21 vendors are and those are the accounts payable. What else  
22 is there?

23 MR. WANDER: Judge, with all due respect to those  
24 professionals, I don't believe, based upon their track  
25 record in the case of the numbers they've been giving, that

1 they are reliable figures. They simply said, Yes, and we  
2 took that into account.

3 THE COURT: No, no, no. He testified that the  
4 number is right off of their accounts payable; that's how he  
5 came up with that number. Those are the accounts payable.

6 MR. WANDER: Judge, in the claim objections that  
7 have been filed in the past two weeks, and they were not  
8 able to --

9 THE COURT: That's a separate point. I want to go  
10 back to the point where you said that they're not taking  
11 into account countless claims that will be filed.

12 MR. WANDER: Yep. Because you're talking about  
13 just simple payables. What I'm saying is every re-  
14 classification --

15 THE COURT: No. What else is there in what is to  
16 be filed, other than -- what is to be paid are the payables  
17 that haven't already been filed.

18 MR. WANDER: Oh, there's the 503(b)(9) claims.  
19 There's 50 --

20 THE COURT: There's a bar date for that, right?

21 MR. WANDER: So, they'd just assume --

22 THE COURT: No, I'm talking about -- you said  
23 there were -- I'm questioning your credibility. You just  
24 said to me that there are countless claims that are to be  
25 filed that they haven't counted.



1 So, what claims that are to be filed, have they not counted,  
2 other than you said payables, which they have counted. So,  
3 what else is there?

4 MR. WANDER: They counted as they went.

5 THE COURT: No, no. Payables are payables. They  
6 counted those.

7 MR. WANDER: No, I'm --

8 THE COURT: I'm talking about what you told me:  
9 There are many countless claims to be filed.

10 MR. WANDER: Right.

11 THE COURT: So, are you backing off of that now?  
12 Are you saying that there really aren't countless claims to  
13 be filed?

14 MR. WANDER: No, it's in their chart.

15 THE COURT: Is there anything beyond that?  
16 Because that's really what you just said to me, there are  
17 countless claims beyond what they have said in their chart  
18 are to be filed.

19 MR. WANDER: No, I didn't say not in their chart.  
20 I'm saying in their chart there are hundreds of millions of  
21 dollars of claims relating to administrative claims -- it's  
22 defined as outstanding claims -- hundreds of millions of  
23 dollars of claims, objections that have been filed, and even  
24 more that haven't been filed, that they assume they win each  
25 one. That's how --

1 THE COURT: How can you object to a claim that  
2 hasn't been filed?

3 MR. WANDER: No, no, no. Their claim objections  
4 haven't been filed. If I misspoke, I apologize.  
5 There are hundreds of millions of dollars of claim  
6 objections filed --

7 THE COURT: All right. Let's go through the  
8 chart. Let's do it. I mean, I guess we have to.  
9 Sorry, Mr. Fox. We'll probably get to you tomorrow, all  
10 right.

11 (Pause.)

12 THE COURT: All right. I'm looking at Mr.  
13 Murphy's declaration. Do you have that there?

14 MR. WANDER: One moment, Your Honor.

15 (Pause.)

16 THE COURT: Okay. So, on Page 21 he has his  
17 503(b)(9) chart. On Page 23 he has the other expense chart.

18 MR. WANDER: Okay.

19 THE COURT: In Paragraph 44 he says, "Additional  
20 anticipated objections totaling 44 million are expected to  
21 be filed." Not hundreds of millions -- 44 million, all  
22 right -- and that's for a re-classification.

23 MR. WANDER: Right. So, starting on Page --

24 THE COURT: Well, let's just focus on that. Do  
25 you have --

1 MR. WANDER: I was going to start on 71.

2 THE COURT: So, as far as the to-be-filed  
3 objections on re-classification --

4 MR. WANDER: Are you talking about the forty-four  
5 million-dollar number?

6 THE COURT: Yes.

7 MR. WANDER: Yeah.

8 THE COURT: Right. Right.

9 MR. WANDER: Okay. So, that's 44 million.

10 THE COURT: Right.

11 MR. WANDER: I would --

12 THE COURT: For re-classification. So, as you  
13 know, it is difficult to establish an administrative  
14 expense. I think as you also know, people often check the  
15 administrative expense box or whatever --

16 MR. WANDER: I believe that a lot of these -- the  
17 issues within this have to do with the received date.  
18 Not --

19 THE COURT: No, that's fine.

20 MR. WANDER: And I want you to know that the  
21 receive date is not only for foreign vendors. My other  
22 client --

23 THE COURT: I understand the issue, all right.  
24 So, that's 44 million.

25 MR. WANDER: Okay.

1 THE COURT: And then we have the pending  
2 objections, right --

3 MR. WANDER: Which page is Your Honor on?

4 THE COURT: -- which is at the top of that page.  
5 So, I don't see hundreds of millions there. I see an  
6 outside amount of 44 million.

7 MR. WANDER: Well, Your Honor, if we could -- you  
8 first pointed to Page 21 --

9 THE COURT: Well, let's deal with 23 first, the  
10 admins.

11 MR. WANDER: Okay. That is also on Page 21.

12 THE COURT: Well, that's dealing with the  
13 503(b)(9)s.

14 MR. WANDER: Right.

15 THE COURT: So, let's deal with the other admins  
16 first.

17 MR. WANDER: Okay. So, I'm looking at  
18 Paragraph 41 --

19 THE COURT: Right.

20 MR. WANDER: -- okay. So, they have minus  
21 objections filed to date, 17.3.

22 THE COURT: Right.

23 MR. WANDER: And my point is there's no order  
24 disallowing those claims.

25 THE COURT: That's fine. But almost half of those

1 are claims that are objected to -- well, 10 million --  
2 actually 11 million are claims that are objected to because  
3 they're satisfied, all right. That's --

4 MR. WANDER: I'm not talking about those.

5 THE COURT: Well, you just said that there are 17  
6 million that are pending, and you're basically telling me  
7 that since I haven't granted them, I should ignore them.  
8 I'm not going to ignore a claim objection on the basis that  
9 it's satisfied until I see some evidence that, no, we  
10 haven't been satisfied, and, generally speaking, in my  
11 experience, when people like MIII object to claims and while  
12 (indiscernible) signs off on it, they have a valid basis for  
13 saying it's satisfied; similarly, for amended and  
14 superseding. So, that's all that this is.

15 MR. WANDER: No. The -- I don't --

16 THE COURT: This 17,329,000, which you say I  
17 shouldn't count because the order hasn't been entered yet.  
18 So, let's get off of that. Then we're talking about the 44  
19 million that is to be objected to. And I understand that we  
20 don't have a lot of information on that. I appreciate that.

21 MR. WANDER: Your Honor, the 17.3 million --

22 THE COURT: Yes?

23 MR. WANDER: -- okay, I didn't see where it says  
24 that those are claims that have been satisfied.

25 THE COURT: It's on the chart on Page 23.

1 MR. WANDER: Correct. So --

2 THE COURT: Type: Satisfied, 7.883 million.

3 Seventh one: Amended superseding, 975,000. Eighth:

4 Duplicate, 4.8 million. Sixth: Satisfied, 3.66 million.

5 MR. WANDER: Okay. So, then we have the line  
6 items for the second --

7 THE COURT: That's not being counted.

8 MR. WANDER: There's no number there.

9 THE COURT: I know. It's not being counted.

10 MR. WANDER: It's not listed.

11 THE COURT: I agree. It's not being counted.

12 Look, there are a lot of people here. This is not making a  
13 whole lot of sense to me. So, let's move to the big item  
14 here, which is the billion -- one billion seventy-five  
15 million claims expunged upon confirmation, right.

16 MR. WANDER: Which paragraph, Your Honor?

17 THE COURT: In the chart on Page 22. That's how  
18 you get the 1.157 billion down to 50 million. So, do you  
19 have any reason to say that those would not be expunged on  
20 confirmation --

21 MR. WANDER: Your Honor, --

22 THE COURT: -- because they're filed against every  
23 single debtor?

24 MR. WANDER: The second line item is minus  
25 additional anticipated --

1 THE COURT: Wait. That's what I started with.  
2 You're trying to get me to say it was something other than  
3 that 44 million, and we spent the last five minutes showing  
4 that there isn't.

5 MR. WANDER: They have the -- there's the \$30  
6 million --

7 THE COURT: Under payables, yes.

8 MR. WANDER: -- and then I was pointing out on the  
9 prior page on 21, which is the first page that Your Honor  
10 mentioned, that's the 503(b)(9).

11 THE COURT: Well, I'm first dealing with your  
12 statement that there are hundreds of millions of  
13 administrative expenses that they're not counting. I don't  
14 see it. At most, they're not counting 44 million. If you  
15 give them no credit -- and you're saying that they should  
16 have none for saying that they intend to object to them.

17 MR. WANDER: Judge, there are three groups.

18 THE COURT: And I intend to discount that 44  
19 million and say that they probably won't be able to object  
20 to all of successfully. So, let's move to Page 21. That's  
21 the 503(b)(9)s. There, you have a couple of legal issues.

22 MR. WANDER: So, this --

23 THE COURT: Is there anything else?

24 MR. WANDER: So, you have 36 million of claims  
25 that they say reclassified --

1 THE COURT: Right.

2 MR. WANDER: -- that basically, I believe, relates  
3 to delivery dates, which is a disputed issue --

4 THE COURT: Right.

5 MR. WANDER: -- and not just for foreign vendors.

6 THE COURT: Right.

7 MR. WANDER: And then there's another -- the fifth  
8 claim objection is another \$20 million, and then it says  
9 below that, "Additional anticipated objections totaling 105  
10 million and there's another 35 million of reclassified and  
11 then there's 60 million of reduced and allow, which, again,  
12 means someone may have said it's an administrative claim --

13 THE COURT: I'm sorry, let me just --

14 MR. WANDER: Sure. I'm on Paragraph 38. And I'm  
15 not counting late-filed. I'm taking reclassified, reduce,  
16 and allow. So, that's 95 million.

17 THE COURT: I'm sorry. Reclassified, 36 --

18 MR. WANDER: Reclassified, 35 million, I think  
19 that is.

20 THE COURT: Well, I'm looking at the chart.

21 MR. WANDER: Okay. That's a separate 36, Your  
22 Honor. In the chart --

23 THE COURT: Okay.

24 MR. WANDER: So, that's 36,087,000. Those are  
25 claim objections that have been filed very recently and no



1 ruling.

2 THE COURT: Right.

3 MR. WANDER: And below is another 35 million of  
4 reclassified.

5 THE COURT: Right.

6 MR. WANDER: So, that's 71. Then there's 60  
7 million in the reduce and allow; that's another 60 --

8 THE COURT: That's just -- look, to me, that's  
9 accounting.

10 MR. WANDER: No, because, for example, with my  
11 client Pearl Global, it has an administrative -- a 503(b)(9)  
12 claim in rough numbers, 450,000, and their objection says it  
13 should be allowed at 350,000. So, they're taken off  
14 100,000, but I have no idea why.

15 THE COURT: Well, I hope you do.

16 MR. WANDER: They haven't said anything.

17 THE COURT: Well, it's probably because of the  
18 purchase orders --

19 MR. WANDER: Judge, I'm simply --

20 THE COURT: -- of what was provided.

21 MR. WANDER: -- saying --

22 THE COURT: All right. So, they have anticipated  
23 objections of 105 million, although, 10 of that is late --

24 MR. WANDER: So, I wasn't counting that.

25 THE COURT: All right. So --

1 MR. WANDER: So, you have the 95 there.

2 THE COURT: Right.

3 MR. WANDER: You have the thirty-six oh eight  
4 seven above. You have the reclassified, the fifth objection  
5 is 20 -- this is the 503(b)(9). You then have the ones we  
6 went through before, the 44 million that Your Honor was  
7 discounting.

8 THE COURT: Right.

9 MR. WANDER: And I said there's also 162 million  
10 that's out there unknown. So, that's where I came up with  
11 the additional hundred thousand -- hundred million dollars  
12 that --

13 THE COURT: Well, and I came up with 70.

14 MR. WANDER: No, no. But I'm saying on top of  
15 that, because --

16 THE COURT: So, 270, even though these numbers add  
17 up to 240?

18 MR. WANDER: Plus the 162 that's not on the chart.

19 THE COURT: I mean, that's -- look, I've already  
20 concluded that that is just -- I don't know what that is.  
21 That's not a basis to argue any --

22 MR. WANDER: I'm saying it doesn't potentially --

23 THE COURT: But it's not a claim. It's nothing.  
24 It's nothing, other than these claims. You can't double  
25 count that. It's nothing.

1 MR. WANDER: I'm not double-counting. These are  
2 claims --

3 THE COURT: No, they're not claims. They've not  
4 been asserted on top of these claims.

5 MR. WANDER: Well, I agree that they haven't been  
6 asserted again. There hasn't been a bar date that would cut  
7 these.

8 THE COURT: Look, the only basis for those claims,  
9 other than them showing up in the debtors' books and records  
10 or having been filed, is that they were defrauded. And I  
11 would think that someone who felt that they were defrauded  
12 would have filed a claim.

13 So, going through all of these numbers, you're  
14 counting -- unless your basing it on that 162,000 -- 162  
15 million, excuse me -- that the debtors lose on all of these  
16 claim objections and to-be-filed claim objections, and I'm  
17 basically cutting it in and a half -- actually a little less  
18 in a couple categories -- and that's why instead of being  
19 170 million on the outside, I basically said 100.

20 So, you know, just -- you know, which is what was  
21 the debtor's outside, which, to me, I think was a reasonable  
22 projection.

23 MR. WANDER: Again -- okay. Your Honor, I'm --  
24 based upon the testimony, I don't believe that they have  
25 shown --

1 THE COURT: Well, we disagree on that point and  
2 we've just spent 20 minutes going through it and I believe  
3 it even more so now. So, enough of that. I'm sorry to be  
4 abrupt with you, Mr. Wander.

5 MR. WANDER: No, that's fine, Your Honor.

6 So, the -- as I said before, if there was one  
7 thing that should be changed, it's the automatic opt-in and  
8 I also believe that it's improper that they haven't  
9 disclosed the compensation as the amended documents say --

10 THE COURT: Well, they're going to have to do that  
11 before I sign off on the order. And I think Mr. Schrock  
12 knows that.

13 MR. WANDER: And I think there should be an  
14 opportunity --

15 THE COURT: Well, on notice. Yeah, on notice.

16 MR. WANDER: Okay. Because it has, in addition --

17 THE COURT: I understand.

18 MR. WANDER: Thank you, Your Honor.

19 THE COURT: Okay.

20 MR. SCHWARTZBERG: Your Honor, Paul Schwartzberg  
21 for the U.S. Trustee's Office. I'll be quick.

22 THE COURT: Okay.

23 MR. SCHWARTZBERG: Your Honor, we filed an  
24 objection -- two points. The only point I want to raise at  
25 this point is the 1143(d) -- I think I got the Code section

1 right -- where the debtors are getting both in this case, a  
2 release -- I think as they are defined as a released  
3 party -- as well as the injunction. Parties are enjoined  
4 from going after the debtor --

5 THE COURT: Except to enforce the plan.

6 MR. SCHWARTZBERG: Excuse me, Your Honor?

7 THE COURT: Except to enforce the plan.

8 MR. SCHWARTZBERG: The injunction. Combining the  
9 injunction, Your Honor, and release, we believe is akin to a  
10 discharge. If --

11 THE COURT: I don't understand that. I mean the  
12 whole purpose of the plan is that the parties are bound by  
13 it, assuming it goes effective, and --

14 MR. SCHWARTZBERG: Well, after the assets are all  
15 transferred to the litigation trust, you're just left with a  
16 shell.

17 THE COURT: I understand that, but 1140 --

18 MR. SCHWARTZBERG: 41(d)(3).

19 THE COURT: No, I'm focusing on a different  
20 section -- 1141. Except as provided in Subsections (b)(2)  
21 and (b)(3), the provisions of a confirmed plan bind the  
22 debtor, et cetera, et cetera, et cetera, including the  
23 creditors, whether or not such creditors, equity, security  
24 holders, or general partners have accepted the plan.

25 So, if the injunction simply means that people's

1 rights to go after the debtor is limited to as long as the  
2 plan is ongoing, enforcing the plan just would seem to be  
3 completely consistent with 1141(a). All you're doing with  
4 the injunction is preventing people to ignore -- from  
5 ignoring the plan and going around the plan.

6 MR. SCHWARTZBERG: Well, I --

7 THE COURT: Now, as far as the release point is  
8 concerned, it seems to me that, again, the release should  
9 apply to the debtor, only to the extent that the plan is  
10 operative, right?

11 MR. SCHWARTZBERG: Uh-huh.

12 THE COURT: I'm not sure that's the case here in  
13 looking at it, but I think it's worth clarifying that point.

14 But other than that, I don't see why this is an  
15 issue. I mean, I -- if you didn't have this, the debtor  
16 would have to sue everybody for breaching the plan if they  
17 went in and tried to collect. You know, if some creditor  
18 said, I'm unhappy with my result under the plan, an  
19 unsecured creditor, so they go and try to collect the money  
20 that's in the trust.

21 MR. SCHWARTZBERG: Your Honor, we're not objecting  
22 to the injunction as it applies to the trust (indiscernible)  
23 as it applies to the debtor's property, but as is applied --

24 THE COURT: But the property is going into the  
25 trust. I don't understand --

1 MR. SCHWARTZBERG: Well, only to the debtor's  
2 shell, Your Honor, after all the assets are transferred.

3 THE COURT: But what does it matter?

4 MR. SCHWARTZBERG: At that point, we're concerned  
5 about trafficking in an empty shell.

6 THE COURT: But that certainly didn't come out of  
7 the objection.

8 MR. SINGH: Your Honor, I'm rising -- not to  
9 interrupt --

10 THE COURT: (Indiscernible) brief.

11 MR. SINGH: But just one clarification that people  
12 might be misreading. The release provision specifically  
13 carves out the debtor.

14 THE COURT: Right.

15 MR. SINGH: So, the debtors are not getting a  
16 release. They, as you said, are just relying on the  
17 injunction. It's in 10.6(b)(3), you know, as to who's  
18 getting a release. Each of the release parties  
19 parenthetical, other than the debtors --

20 MR. SCHWARTZBERG: Okay. Because --

21 MR. SINGH: -- because they just get the  
22 injunction --

23 MR. SCHWARTZBERG: Section 1.135 includes the  
24 definition of released parties.

25 THE COURT: No, then it says, Other than --

1 MR. SINGH: It's other than the debtors in the  
2 operative release section.

3 THE COURT: Okay.

4 MR. SINGH: It's just the injunction for the  
5 debtors.

6 THE COURT: But, again, I just don't --

7 MR. SINGH: Other than that, Your Honor, I don't  
8 want to belabor the point.

9 THE COURT: I mean, there's one case on this. The  
10 Judge's colleague in the Southern District of Texas pretty  
11 rudely disagreed with him, and without being rude, I  
12 disagree with him, too. I just think In re ASR 2401  
13 Fountain -- whatever it's called -- Fountainview, I think,  
14 LLC, 2515 LexisNexis 1783, Page 15, (Bankr. S.D. Tex.  
15 May. 29, 2015) actually got it right in (indiscernible) or  
16 it's really dicta anyway, since the plan wasn't going to be  
17 confirmed in the first place and the judge was just pretty  
18 mad about the release provisions in the plan. I think went  
19 overboard on this point. Didn't really focus on 1141(a).

20 Is there any indication that there's going to be  
21 some sort of sale of --

22 MR. SCHWARTZBERG: No, Your Honor.

23 THE COURT: Okay. So, I don't -- I mean, look,  
24 obviously, there's a separate provision of the Code that  
25 talks about tax avoidance and the like or any other



1 provision violating the law. I just don't have that in the  
2 record, so I'm don't -- I'm going to overrule that part of  
3 the objection.

4 MR. SCHWARTZBERG: And I'll rely on my pleadings  
5 on the nondebtor release.

6 THE COURT: Another nondebtor release. It's --  
7 the debtors have treated everyone who's objected on that  
8 basis and anyone who opted out as being not bound by the  
9 release, and as far as I'm concerned, that's enough. I  
10 mean, I think the notice was very clear, and, again, I don't  
11 believe that where clearly I have jurisdiction under the  
12 case law, which the debtors have cited, including the  
13 CareOne case, that there's any basis to not object to a plan  
14 where the release language is clear and then come back later  
15 and say, Oh, you know, this provision of the plan should be  
16 carved out.

17 I think a plan is much broader than a contract, as  
18 the debtor's brief said. So, I will overrule that  
19 objection, too.

20 MR. SCHWARTZBERG: Thank you.

21 THE COURT: Anyone else?

22 MS. SCHAEEL: Your Honor, I'm on the telephone.  
23 Can I be heard?

24 THE COURT: Sure.

25 MS. SCHAEEL: Courtney Schael, on behalf of Shinn

1 Fu. We filed an objection to confirmation going into the  
2 other objections by the administrative creditors.

3 I just wanted to -- I tend to agree with Mr.  
4 Wander on the disconnect with the 503(b) claims. The  
5 testimony was that they're going to rely on their accounts  
6 payable books and records to determine what those claims  
7 are. But very early on in the case, I was informed by the  
8 debtor's counsel that they consider any of the post-petition  
9 deliveries, so prepetition orders to be unsecured claims.

10 And I think the testimony was a little vague on  
11 this, but it seemed to indicate that those post-petition  
12 payables, books and records of the debtors would not include  
13 those claims --

14 THE COURT: No, I --

15 MS. SCHAELE: -- of creditors who --

16 THE COURT: -- I didn't take the testimony to  
17 suggest that.

18 What I was focusing on, and what I asked Mr.  
19 Murphy about was the specific item in the chart in his  
20 declaration that had \$30 million of other claims. And I  
21 took those to be current accounts payable, not claims that  
22 have been asserted already or the like. That's just  
23 covering the remaining accounts payable.

24 They're not cutting -- in other words, I did not  
25 take his testimony to mean that they're somehow only looking

1 at their accounts payable for the post-petition period and  
2 saying that's the ambit of claims. They have to deal with  
3 it, and I think he has dealt with the claims that have been  
4 asserted, including, claims in transit, et cetera -- goods  
5 in transit, and the like, for the prepetition hearing.

6 MS. SCHAEEL: I guess the disconnect that I'm  
7 having is if delivered goods post-petition and sent the  
8 debtor an invoice and said we have a post-petition claim,  
9 here's our bill. And then this plan gets confirmed and we  
10 go forward with the procedure that they're talking about  
11 now, those creditors will never have an administrative bar  
12 date to file an administrative claim, that the debtor has  
13 already, at least, represented to my client that they  
14 consider those claims unsecured and there would be no  
15 process, where my client, having not filed a claim, would  
16 even know that the debtor was going to write it off and  
17 treat it as unsecured because it was from a prepetition  
18 order.

19 THE COURT: Well, they can always file an  
20 administrative expense, always.

21 MS. SCHAEEL: Yeah. My other concern was the  
22 proposed settlement with the ad hoc committee. Given the  
23 lack of notice and that the Debtor has indicated that it's  
24 not required under confirmation of the plan, I would ask the  
25 Court to adjourn approval of that so that the parties have a

1 chance to review it and file objections in the appropriate  
2 time period.

3 THE COURT: Well, the objection would only be that  
4 it's too good, right? It's too good a settlement for the  
5 administrative creditors who are the beneficiaries of it?  
6 I'm not trying to be facetious, but I think the objection  
7 would be that the debtors have made a bad deal and it's too  
8 good for the administrative expense creditors that have  
9 signed onto it.

10 MS. SCHAEEL: Exactly. I think the creditors --

11 THE COURT: All right. So, but if your client has  
12 the right to opt into it, as well, then what's the problem?

13 MS. SCHAEEL: Because under the Code -- the problem  
14 is, under the Code, my client is entitled to 100 percent  
15 payment on the effective date.

16 THE COURT: No. But I'm just focusing on the  
17 notice point. What's there to -- you will have an  
18 appropriate time to review it and determine to determine  
19 whether you want to opt into it. So, I don't understand why  
20 you would need more notice to determine whether it was too  
21 good or not as far as objecting to it, as long as you have  
22 the chance to object to it.

23 MS. SCHAEEL: I'm talking about objecting to it,  
24 the whole settlement as a whole. If there's any chance that  
25 creditors that opt-out of the settlement will not get paid

1 100 percent at the end of the day, then the creditors who  
2 opt-in are getting treated better than the creditors who  
3 waited. I mean, they're effectively circumventing the Code  
4 that requires in the plan confirmation, that creditors get  
5 paid 100 cents on the dollar to the settlement.

6 THE COURT: Okay. I've heard --

7 MS. SCHAELE: There's also problems with the  
8 objecting procedures. I think the debtor purposefully --  
9 and knowing we didn't file the orders on the administrative  
10 claim issue, because now that you have the door left open  
11 where they can resolve claims anywhere they see fit. They  
12 can -- some people might get the benefit of -- well, the  
13 Court's in a "behind the door" settlement, some creditors  
14 might not.

15 With this procedure that's in place, nobody is  
16 going to know if another creditor got a better deal and got,  
17 you know, and gets a (indiscernible) from another creditor.  
18 It's all going to be done (indiscernible) and -- excuse me,  
19 I have a slight cold here -- and the creditors won't be  
20 treated the same.

21 Those are the types of things that I think parties  
22 should have the right to review the settlement and to look  
23 at the entire construct of it and object to it on those --  
24 on points like those.

25 THE COURT: Well, under liquidation procedures --

1 I guess this is a question for Mr. Schrock -- what is the  
2 check on the debtors cutting a sweetheart deal with someone?

3 MR. SCHROCK: Your Honor, there's an  
4 administrative claims representative that's on the  
5 restructuring committee or serving alongside. You've got,  
6 certainly, the creditors' committee is still in place.

7 But all we do, frankly, now as an estate, is, you  
8 know, we're reconciling claims as fiduciaries. And when it  
9 comes to administrative claims, those are things that,  
10 frankly, you know, any debtor is doing all the time. We're  
11 going to be recording --

12 THE COURT: Well, there's a claims procedures  
13 order in place in the case --

14 MR. SCHROCK: Yes.

15 THE COURT: -- right? Is that what you would  
16 follow or would there be -- I mean, obviously there's a  
17 separate procedure for sharing information, having Ruby the  
18 parties who are entitled to, you know, review that analysis;  
19 otherwise, would you be following the claims procedures.

20 MR. SCHROCK: Well, not with regard to  
21 administrative claims, no --

22 THE COURT: No? All right.

23 MR. SCHROCK: -- Your Honor. I mean, we would --  
24 you know, if people want some additional -- we have  
25 reporting that's going on in accordance with the settlement.

1 We have the administrative claims rep and we felt that that  
2 was, frankly, sufficient.

3 I'd look at it this way, if we didn't have the  
4 settlement and all this is, is an opt-in settlement, the  
5 debtors would be reconciling administrative claims in the  
6 ordinary course as they prepare for the effective date. So,  
7 I didn't understand why we need to put, like, another check  
8 on it simply because we had an opt-in process.

9 THE COURT: Well, that's why I was asking about  
10 the claims procedures order. You're saying that doesn't --  
11 I haven't looked at it -- that doesn't apply to admins?

12 MR. SCHROCK: That's correct.

13 THE COURT: So, then you're just guided by 9019.

14 MR. SCHROCK: Right.

15 THE COURT: And I guess there's certain agreements  
16 that are significant enough that you would need to notice  
17 them up under 9019 and the rest you wouldn't.

18 MR. SCHROCK: Right.

19 THE COURT: And that would still apply -- and that  
20 wouldn't change under this order?

21 MR. SCHROCK: That's correct, Your Honor.

22 THE COURT: You know, you could do them a notice  
23 of presentment, but it would only be things that were out of  
24 the ordinary course.

25 Okay. All right.

1 MR. SARACHEK: Your Honor, Joe Sarachek. I  
2 represent 15 administrative creditors. The bulk of them are  
3 foreign creditors.

4 And while I want to thank Ms. Morabito for her  
5 efforts and really hard work in negotiating this, I think  
6 it's important that the Court know that she represents --  
7 the only people that have signed onto this are trade claim  
8 purchasers and they are all purchasers of domestic Claims.

9 And the issue, really, that I'm going to say where  
10 there's discrimination here and where I have a lot of  
11 concern under 11-2099, is that foreign trade vendors -- and  
12 I'm not going to repeat all of what Mr. Wander said -- but  
13 foreign trade vendors who are seeing this settlement -- and  
14 we haven't even been able to get the settlement to all of  
15 our creditors -- we're in China, Vietnam, India -- they're  
16 going to be -- the practical reality of this settlement is  
17 that there's going to be a preponderance of sales claims.

18 And just to give you a sense, the bid from one of  
19 Ms. Morabito's clients last week, what time this was still  
20 being negotiated, was 20 cents, okay, which tells you that  
21 everybody -- like, we're all adults here, we all know that  
22 the debtor is administratively, let's call it on the line of  
23 being administratively insolvent or is administratively  
24 insolvent, and the practical effect of that agreement is  
25 going to be that vendors, particularly foreign vendors are



1 going to be compelled to basically take cash now.

2 THE COURT: Why?

3 MR. SARACHEK: Because they're going to see what  
4 amounts to a pool of cash that is, let's call it 10 percent,  
5 as Ms. Morabito said, and there's just like an inherent  
6 discrimination in the plan with this settlement agreement --

7 THE COURT: They would have the right to opt-in.

8 MR. SARACHEK: I get it, but, by the way, many of  
9 those vendors' claims -- and, again, I'm not debating world  
10 imports -- have been objected to already. I will tell  
11 you --

12 THE COURT: Okay. But they still get -- but --  
13 I'm sorry -- they still have the right to opt-in.

14 MR. SARACHEK: I understand, but in reality, you  
15 are faced with two choices: you sell your claim or,  
16 basically, you compromise your claim at a considerable  
17 discount and opt-in. And that's --

18 THE COURT: Well, you have -- you have another  
19 choice: you can opt-out.

20 MR. SARACHEK: You can opt-out and get no cash  
21 and, basically, be in a situation -- and most of these  
22 vendors, just to it's clear, continue to supply transform,  
23 which brings me to my next point, which is I really don't  
24 see -- the elephant in the room here is ESL. Had they paid  
25 the 503(b)(9) claims, these people would have money in their

1 pocket.

2 THE COURT: Yes.

3 MR. SARACHEK: Money that they were counting on in  
4 their pocket. And, Your Honor, I just don't see --

5 THE COURT: By the way, that's why I was somewhat  
6 skeptical when M3's projections were being attacked, because  
7 I understand your point.

8 MR. SARACHEK: I'm not attacking them.

9 THE COURT: No, I understand.

10 MR. SARACHEK: But, as you know, I also moved for  
11 a mediation hearing and I know everyone laughs at it and so  
12 on and so forth, but there have been other big cases with  
13 contentious issues, okay, where mediation has brought about  
14 a result.

15 And the reality is that these vendors, who have  
16 been the lifeblood of Sears when it was going on, these  
17 vendors need to be paid. They need the cash. They will --  
18 I have many clients who are, themselves, on the verge of  
19 insolvency.

20 So, mediation -- and I don't see the need for  
21 confirmation today. We're not talking about going effective  
22 today.

23 Our hearing is on the 23rd. My -- and I would  
24 urge the Court to bring the parties together -- ESL, as  
25 well -- because at the end of the day, that's the elephant

1 until the room. That's where, ultimately, do we really have  
2 to wait three years? Do we have to burn -- and no offense  
3 meant to akin or anyone else -- do we have to burn \$20  
4 million in legal fees?

5 It doesn't make sense to me. It doesn't make  
6 sense to my clients. We need all parties around the table  
7 to negotiate a resolution, and not a resolution that gives  
8 clients 10 cents.

9 As you know, these foreign manufacturers, they're  
10 not working on huge margins in today's marketplace --  
11 they're not -- so they can't afford to take 10 cents,  
12 20 cents -- they can't afford it. And they're the real  
13 victims here.

14 THE COURT: Well, I believe the evidence shows  
15 that if they don't opt-in, they will get 100 cents,  
16 eventually. There's a time issue and there's a risk issue  
17 but given the litigation backdrop here that you're referring  
18 to -- and I thought about this carefully -- I'm a firm  
19 proponent of mediation; I served as a mediator in a number  
20 of large cases -- I don't see a basis for a mediation here  
21 that would involve ESL in any sort of meaningful settlement,  
22 at this point. It's not in their interests to do it. If I  
23 were representing them, I wouldn't do it.

24 MR. SARACHEK: But it is in their --

25 THE COURT: No, it isn't. It's not in their

1 interests at this point.

2 MR. SARACHEK: Because their former Board is being  
3 sued. Lawyers -- there's a hundred-fifty-million-dollar D&O  
4 policy there.

5 THE COURT: I saw that. It's not in their  
6 interests --

7 MR. SARACHEK: Seritage --

8 THE COURT: -- you know, at this point in the case  
9 to settle for an amount that is actually warranted solely to  
10 provide people with cash now. It's not advantageous to do  
11 it.

12 And I don't see the mediation succeeding, and I  
13 see the burning of a lot of cash in the meantime, to learn  
14 that result, which I can predict. I put myself, mentally,  
15 as if I were the mediator in that conference room. It ain't  
16 going to happen.

17 The mediation that might happen is the one that I  
18 suggested to Mr. Wander about half an hour ago -- that might  
19 happen -- and the parties are perfectly capable of  
20 negotiating that result.

21 MR. SARACHEK: I will tell you, Your Honor,  
22 respectfully, one reason ESL should mediate is because  
23 they're not getting trade credit today.

24 THE COURT: They should mediate, but then hold out  
25 for a ridiculously low sum. I'm not going to let that

1 happen.

2 MR. SARACHEK: And it's -- by the way, the fact  
3 that ESL is not getting trade credit today is affecting the  
4 future of new Sears.

5 THE COURT: That's a separate issue.

6 MR. SARACHEK: I understand, but we're talking  
7 about why to mediate.

8 THE COURT: And they may well want to deal with  
9 your clients on -- they may want to deal with your clients  
10 on that basis, but, clearly, the mediation that you're  
11 talking about is one where they would raise all of these  
12 other issues in the litigation and it would either not go  
13 anywhere or there would be pressure for a deal that just  
14 isn't warranted from the estate's point of view.

15 The other points that you're making are legitimate  
16 points and they're points that, certainly, Transform should  
17 think about, but that affects Transform's business going  
18 forward, not the claims against ESL.

19 MR. SARACHEK: Thank you, Your Honor.

20 THE COURT: Before we -- we've been just dealing  
21 with the admins. Are there any other people with admin,  
22 (a) (9), or (a) (11) objections that want to be heard?

23 Okay. I --

24 MR. ARNOLD: Your Honor, this is Tom Arnold,  
25 appearing telephonically, on behalf of Weihai Lianqiao. I

1 just wanted to state my appearance on the record so our  
2 objection wasn't waived.

3 THE COURT: Okay. All right.

4 MS. ROGERS: Your Honor, this is Beth Rogers for  
5 Serta Simmons Bedding Company. I also wanted to state our  
6 objection on the record so it wouldn't be waived.

7 THE COURT: Okay. You know, there are many other  
8 people who joined in other objections. If those objections  
9 that they've joined in have been settled, I'm not sure what  
10 their status is, but by taking people or acknowledging  
11 people on the record, I'm not conferring on them anything  
12 more than their rights as a joining party.

13 MR. GREENE: Good afternoon, Your Honor. Anthony  
14 Greene, from Alston & Bird, on behalf of 20th Century Fox  
15 Entertainment.

16 We joined in an objection that was settled, but we  
17 were not part of the settlement, so our objection still  
18 stands.

19 THE COURT: Well, I'm not sure about that.  
20 Frankly, if you join in something and then people have  
21 settled it, what have you joined in? Something that's been  
22 settled.

23 I'm not ruling on that today, but I'm just saying  
24 when people stand up and say, I'm here to note my rights on  
25 the record, the rights are only the rights that you have as

1 a party that's joined.

2 MR. GREENE: Understood. Thank you.

3 THE COURT: Okay. I did not understand, before we  
4 get to other objections, while you only have 17 days to opt-  
5 in and 33 days to opt-out, particularly, given that there  
6 are foreign creditors and we're dealing with a deemed opt-  
7 in, why can't there just be the 30 days for everybody?

8 MR. SCHROCK: Just so I understand -- Ray Schrock  
9 from Weil Gotshal, for the debtors -- so, you're saying, why  
10 couldn't we have the same time limit for everyone?

11 THE COURT: Yes. Yeah.

12 MR. SCHROCK: I suppose we could. That would be  
13 fine.

14 THE COURT: And, particularly, since I think the  
15 opt-outs and the opt-ins will have focused on it --

16 MR. SCHROCK: Right.

17 THE COURT: -- but the noes -- no responses at all  
18 may not focus on it --

19 MR. SCHROCK: Yes.

20 THE COURT: -- and I'd rather give them a little  
21 more time so they could talk --

22 MR. SCHROCK: Sure.

23 THE COURT: -- to someone about it.

24 MS. MORABITO: Your Honor, Erika Morabito, on  
25 behalf of the ad hoc.

1           We have no problem with that. I think the intent  
2           was just so that we could get an administrative  
3           representative --

4           THE COURT: Going.

5           MS. MORABITO: -- from the point of sooner, rather  
6           than later.

7           THE COURT: Okay. But I think that's -- I'd  
8           rather have the group who are in better informed.

9           MR. SCHROCK: Okay.

10          THE COURT: Okay.

11          (Pause.)

12          MR. FOX: Good afternoon, Your Honor. Edward Fox,  
13          from Seyfarth Shaw, on behalf of the Wilmington Trust  
14          National Association, as indenture trustee and filing agent.

15                 Your Honor, shifting gears to a slightly different  
16          set of issues, I want to address my counts mainly to the  
17          what is sometimes known as, I guess what was originally  
18          known as the substantive consolidation settlement. It has  
19          more recently been known as the plan settlement, and now,  
20          seemingly, Murphy into some other settlements.

21                 I want to begin, though, by just pointing out the  
22          fact of how the voting broke down here. I know we have in  
23          the record the declaration, with respect to voting, and it  
24          has a chart attached to it, which is in very small print --  
25          we blew it up and I can share it with you if you'd like --



1 but I think it's important to know that despite the -- you  
2 know, the phraseology in the confirmation brief and among  
3 the debtor's comments, I think the reality is that this plan  
4 was crushed, with respect to the unsecured creditors in  
5 Class 4 in a couple of instances, where they were the  
6 guaranteed claims, I think it was in Kmart, Illinois, and  
7 Washington.

8 It was rejected by the unsecured creditors that 30  
9 of the debtor entities --

10 THE COURT: Any dollar amount?

11 MR. FOX: In dollar amount.

12 THE COURT: Not in number, but in dollar amount,  
13 because of the guaranteed claims.

14 MR. FOX: Well, whatever those claims were -- in  
15 most cases, as I was saying, according to the chart, they  
16 were listed as unsecured claims in Class 4.

17 Just to go through a few of the significant  
18 debtors in the case, at Kmart, 83 million accepted, 302  
19 million rejected. It was a 78 percent rejection.

20 THE COURT: In number or dollar amount?

21 MR. FOX: That's in dollar amount.

22 THE COURT: But in number, it was?

23 MR. FOX: So, probably flipped slightly the other  
24 way.

25 THE COURT: Well, it was like 87, wasn't it, 87

1 percent of the number accepted?

2 MR. FOX: I can --

3 THE COURT: In any event, the dollar amount  
4 rejected. I get that.

5 MR. FOX: Right. And at Kmart Holding  
6 Corporation, there was 93 percent rejection that amounted to  
7 6 percent acceptance --

8 THE COURT: In dollar amount?

9 MR. FOX: In dollar amount.

10 THE COURT: So, obviously, this is not an accepted  
11 class. So, substantive consolidation can't be based on  
12 1129(a), acceptance.

13 MR. FOX: Yes, that's right.

14 THE COURT: Okay.

15 MR. FOX: So, the debtors could cram the plan  
16 down, but when you get to the question, the real question of  
17 whether or not the substantive consolidation settlement  
18 should be approved, then that's where the Iridium factors,  
19 the paramount interests of creditors and their views,  
20 becomes important. And I think that's what these numbers  
21 reflect.

22 And even at some -- and, remember, we're talking  
23 about a substantive consolidation. In many of these  
24 situations -- many of these cases, the Kmart creditors would  
25 get a greater recovery. The Sears creditors would probably

1 get no recovery, absent substantive consolidation, and even  
2 the notice, for instance, of Sears Holding Corporation, the  
3 vote to reject was 74 in amount versus 25 percent in an  
4 amount to accept, with 595 million voting to reject.

5 And at Sears Roebuck Acceptance Corp., the  
6 rejection was 667 million rejected, which was an 88 percent  
7 rejection.

8 THE COURT: But these are all the same guarantee  
9 creditors, right?

10 MR. FOX: Well --

11 THE COURT: So, they're voting their interests  
12 across the board, aren't they?

13 MR. FOX: Well, I'm not sure. They're not the  
14 same dollar amount at every plan -- at every debtor.

15 As I said, for instance, Sears Roebuck, it's 667  
16 million rejected. Sears Holdings is 595 million. Sears  
17 Roebuck, 340 million rejected for 75 percent.

18 There's probably overlap in many of these cases,  
19 but there's, obviously, more of what I consider rejected,  
20 and in some cases, I think they may not have even had  
21 guarantee claims. I just don't know.

22 But the point is, at the significant debtors, the  
23 unsecured claims, that class did not accept this plan  
24 because they didn't have -- they didn't get the votes on the  
25 amount.

1 And of the 22 accepting debtors, the largest  
2 amount of accepting unsecured creditors was \$1.7 million,  
3 and that was at Max Irving.

4 So, as I said, the voting results are particularly  
5 important here because of the third Iridium factor, which  
6 considers the paramount interest of creditors, including  
7 each affected class' relative benefits and the degree to  
8 which creditors either do not object to or affirmatively  
9 support the proposed settlement.

10 And in the 30 of the most significant debtors with  
11 the most substantial claims, by far, the unsecured creditors  
12 who would be affected by this settlement rejected -- their  
13 class is rejected.

14 And I believe as we walk through this --

15 THE COURT: Well, you know what? It's late and I  
16 do want Mr. Wander to talk to Mr. Schrock about what I  
17 suggested. So, I want you as a representative of indenture  
18 trustee to think about the consequences of a rejection and  
19 how your beneficiaries would react to that, and I'll resume  
20 next week.

21 UNIDENTIFIED SPEAKER: I'm tired of hypotheticals.

22 THE COURT: People, try to negotiate in person. I  
23 have the record here. You're representing an indenture  
24 trustee. I don't get it. I don't get your point.

25 I don't see any alternative, other than

1 liquidation here, or a negotiation, and you've had your  
2 chance to negotiate. So, I want to give Mr. Wander a chance  
3 to do something realistic with the professionals and,  
4 frankly, I could meet with you and give you my idea of what  
5 I think would be realistic and I want to see the notice that  
6 would go to the admins and maybe a memorialization of some  
7 of the points that we've otherwise laid, and we'll resume  
8 with more argument on this, but -- put your money where your  
9 mouth, as far as the indenture trustee is concerned. If you  
10 want it, you could have it.

11 (Whereupon, these proceedings were concluded at 5:54  
12 p.m.)  
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I N D E X

T E S T I M O N Y

WITNESS	EXAM BY	PAGE	LINE
William Transier	Mr. Wander	57	5
Brian Griffith	Mr. Wander	62	3
Brian Griffith	Mr. Genender	85	18
Brian Griffith	Mr. Wander	88	20
William Murphy	Ms. Lieberman	91	3
William Murphy	Mr. Wander	93	9
William Murphy	Mr. Genender	136	4

R U L I N G S

DESCRIPTION	PAGE	LINE
Court will enter an order approving Debtor's proposed settlement with retiree committee	26	10

I N D E X, cont'd

E X H I B I T S

NO.	DESCRIPTION	ID.	EVID.
---	Declaration of Craig E. Johnson of Prime Clerk LLC re solicitation of votes and tabulation of ballots	---	54
---	Declaration of William Transier, dated 9/13/19, submitted as direct testimony	---	55
---	Declaration of Brian Griffith, dated 9/13/19, submitted as direct testimony	---	60
---	Supplemental declaration of Brian Griffith, dated 10/1/19, submitted as direct testimony	---	60
FOR THE DEBTOR/WILMINGTON TRUST/ADMINISTRATIVE CLAIMANTS:			
	Joint exhibits	---	59

C E R T I F I C A T I O N

We, Lisa Beck, Sheila Orms, Sherri Breach, Jamie Gallagher  
and William Garling certify that the foregoing transcript is  
a true and accurate record of the proceedings.

\_\_\_\_\_  
Lisa Beck

\_\_\_\_\_  
Sheila Orms

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Sherri L. Breach (CERT\*\*D-397)

AAERT Certified Reporter & Transcriber

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Jamie Gallagher

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Date: October 7, 2019

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<b>&amp;</b>	<b>10,500</b> 22:15,24	<b>10601</b> 1:18	<b>13</b> 56:15 90:12
<b>&amp;</b> 8:2,13 9:1 11:8	<b>10.6</b> 274:17	<b>10:00</b> 2:3	153:3
11:16 12:18 13:1	<b>10/1/19</b> 61:5	<b>10:30</b> 213:8	<b>13.1</b> 65:13
13:9 14:9 15:1,18	298:15	<b>10:32</b> 1:21	<b>130.4</b> 64:10 87:12
18:1,8 19:10 20:7	<b>10/14</b> 127:8,12,19	<b>10:59</b> 7:2	<b>1334</b> 52:25
35:7 55:23 57:8	128:12	<b>10th</b> 188:18	<b>1350</b> 18:3
62:6 93:12 94:21	<b>10/14/18</b> 127:10	189:13	<b>136</b> 297:12
150:22 186:25	<b>100</b> 12:3 16:21	<b>11</b> 2:2,5 7:3 21:11	<b>139</b> 110:15 135:15
289:14 299:13	19:4 37:5 40:17	23:2,10 48:17	167:21 168:1
<b>0</b>	69:21,23 70:21	52:2,3 57:16	<b>13th</b> 56:2 60:9,23
<b>00917</b> 14:5	71:4,22 74:23	97:17 126:24	90:4 192:15
<b>07090</b> 12:5	80:10,21 81:5	127:2 129:3 139:3	<b>14</b> 62:15 128:2,20
<b>07102</b> 19:6,13	97:25 125:9 135:2	145:21 156:15	219:10
<b>1</b>	177:9 206:4 223:4	158:21 214:20,20	<b>14.1</b> 147:17
<b>1</b> 12:4 23:7 37:21	223:12,14,21	215:9 221:25	<b>14.7</b> 121:22 122:1
44:4 45:16,25	224:4,18,22 229:1	222:9 226:13	<b>140</b> 198:11,17
47:8 48:21,25	231:18,21 232:2,3	233:2 239:16	206:11
49:24 53:10,20	233:9,10 234:25	247:2,6,9 264:2	<b>14th</b> 213:16
57:13 60:9 81:8	236:9 237:10	288:22	<b>15</b> 36:2 48:24
83:10 84:1 96:9	243:21 248:23	<b>11-2099</b> 283:11	52:21 72:7 80:24
157:18 197:11	251:20 253:3	<b>111</b> 11:3	129:24 130:5
199:18 213:18	254:8,9,10 270:19	<b>1114</b> 20:20 23:7,8	167:19 205:10
216:12 224:1	279:14 280:1,5	26:24	216:1 248:25
252:3 253:13	286:15	<b>1129</b> 30:23 32:2	249:3 275:14
257:5	<b>100,000</b> 268:14	37:17 139:3 141:8	283:2
<b>1.12.</b> 257:6	<b>10005</b> 15:14	156:1 195:11	<b>150</b> 220:18 223:11
<b>1.135</b> 274:23	<b>10006</b> 13:4	214:20 215:9,9	223:19 231:7
<b>1.157</b> 105:23	<b>10007</b> 10:5	239:16 246:23	250:4,5
265:18	<b>10014</b> 9:16	247:2 293:12	<b>155</b> 129:16 130:4
<b>1.2.</b> 257:4	<b>10016</b> 11:12 14:12	<b>1140</b> 272:17	<b>15th</b> 19:5 21:10
<b>1.4</b> 152:16 204:19	<b>10017</b> 11:19 13:21	<b>1141</b> 272:20 273:3	21:17 131:3
<b>1.55</b> 122:3 124:19	<b>10018</b> 17:19 18:4	275:19	<b>16</b> 49:22 100:24
<b>1.7</b> 207:8 295:2	<b>10019</b> 12:21 18:20	<b>1143</b> 271:25	<b>16.9</b> 22:24
<b>10</b> 64:17 66:1 70:5	<b>10036</b> 9:5 16:5	<b>11501</b> 299:24	<b>162</b> 128:3,19
111:8 123:20	<b>1006</b> 9:15	<b>11th</b> 12:12 102:23	222:4 229:22
151:10 198:23	<b>101</b> 14:19 17:9	190:12	230:23 251:25
213:6 223:23	<b>10119</b> 18:11	<b>12</b> 72:7 99:8	252:2 254:20,23
224:2 248:25	<b>10153</b> 8:5	152:11	255:7,14 269:9,18
249:3 264:1	<b>10158</b> 13:13	<b>120</b> 80:21 81:5	270:14
268:23 284:4	<b>10178</b> 14:21 17:11	<b>1200</b> 10:19	<b>162,000</b> 270:14
286:8,11 297:17	<b>10250</b> 15:21	<b>1220</b> 19:20	<b>1633</b> 18:18
	<b>105</b> 267:9 268:23	<b>12th</b> 191:15	<b>166</b> 166:16,16
			169:24

<p><b>17</b> 28:24 149:20 173:21 264:5 290:4 <b>17,329,000</b> 264:16 <b>17.3</b> 106:1,5 264:21 <b>17.3.</b> 263:21 <b>170</b> 258:12 270:19 <b>1700</b> 15:22 <b>173</b> 139:14 <b>1783</b> 275:14 <b>17th</b> 14:20 <b>18</b> 34:12 91:10,21 92:10 93:1 159:21 159:21 211:14 212:10,17 297:8 <b>18-23538</b> 1:4 2:1 7:3 <b>19</b> 131:19 156:18 <b>1950</b> 16:22 <b>19801</b> 12:13 <b>1984</b> 250:25 <b>1:30</b> 137:2,11 <b>1:32</b> 137:13 <b>1st</b> 31:20 60:24 173:23 180:7,16</p>	<p>297:9 <b>20/20</b> 227:22 <b>200</b> 8:15 10:11 15:3 196:4 206:9 224:20 253:17,18 <b>20005</b> 10:20 <b>2001</b> 21:14 <b>2005</b> 222:11 <b>201</b> 9:14 <b>2010</b> 71:9 <b>2015</b> 275:15 <b>2017</b> 50:13 66:3 <b>2018</b> 41:8 97:12 98:20 127:8 213:15 <b>2019</b> 1:20 21:10 56:2,15 60:9,10 69:24 84:1 90:4 90:13 129:24 133:24,25 134:1 173:23 192:15 257:5 299:19 <b>2019/2020</b> 70:25 <b>2020</b> 70:15,18 <b>2021</b> 70:20,23,25 71:4,19,22 72:2 75:5 <b>20210</b> 10:13 <b>2029</b> 16:11 <b>209</b> 130:17 <b>20th</b> 289:14 <b>21</b> 53:19 63:5 213:15 226:24 252:7 261:16 263:8,11 266:9,20 <b>210</b> 139:11 <b>21st</b> 213:17 214:10 <b>22</b> 165:14 166:13 166:18 167:23 169:4,20 265:17 295:1</p>	<p><b>22.1.</b> 166:23 <b>221</b> 14:3 <b>223</b> 45:24 46:5,13 <b>23</b> 120:8 261:17 263:9 264:25 <b>23,000</b> 158:21 <b>233</b> 2:13 <b>23rd</b> 192:9,19 285:23 <b>24</b> 20:25 124:18 <b>240</b> 269:17 <b>2401</b> 275:12 <b>2425</b> 15:4 <b>248</b> 1:17 <b>25</b> 32:19,20 128:11 179:2,4 183:12 196:23 205:11,15 223:23 224:1,24 232:2 294:3 <b>250</b> 223:22 224:20 <b>2515</b> 275:14 <b>26</b> 297:17 <b>27</b> 198:16 <b>270</b> 254:14 269:16 <b>272</b> 136:7 <b>278</b> 139:11 <b>27th</b> 13:20 17:10 193:3 <b>28</b> 100:23 164:13 199:15 <b>29</b> 63:18 91:8 103:16 106:23 111:14 116:6 275:15 <b>295</b> 13:19 <b>29th</b> 20:21 <b>2:30</b> 137:12 <b>2:33</b> 137:13 <b>2nd</b> 42:9 49:12,14 190:21</p>	<p><b>3</b> <b>3</b> 1:20 21:12,22 150:12 159:23 272:18,21 274:17 297:7,10 <b>3.66</b> 265:4 <b>30</b> 35:25 84:23 95:16,18 104:3,4 104:8,19 105:2,7 108:16,20,25 109:4,14,18,25 110:5 126:25 160:18 173:24 174:12,25 199:1 253:19,20 266:5 277:20 290:7 292:8 295:10 <b>300</b> 1:17 3:15 5:16 8:16 11:17 15:2 49:23 125:5 203:16 299:23 <b>302</b> 292:18 <b>30303</b> 16:23 <b>31</b> 114:21 116:3,3 116:8,16 117:12 <b>31st</b> 18:19 <b>32</b> 129:4 <b>320</b> 122:11 <b>33</b> 29:1 290:5 <b>330</b> 299:22 <b>33rd</b> 16:12 <b>34</b> 47:10 134:3 <b>340</b> 294:17 <b>35</b> 129:10 136:8 187:8 251:19 253:3,21 254:3 267:10,18 268:3 <b>350</b> 122:10 <b>350,000</b> 39:9 40:23 268:13 <b>36</b> 266:24 267:17 267:21</p>
<p><b>2</b> <b>2</b> 20:12 42:24 196:17 250:3 254:6 272:20 <b>2.3</b> 107:3 <b>2.37</b> 121:19 <b>20</b> 36:2 71:1 92:18 92:24 97:16 121:5 128:11 155:14 173:22 174:7 195:24,25 196:3 196:11,22 209:11 210:20 211:16 219:11 220:12 223:24 232:7 267:8 269:5 271:2 283:20 286:3,12</p>			

[36,087,000 - 62]

Page 3

<b>36,087,000</b> 267:24	<b>4708</b> 3:8	236:15 237:24	<b>5149</b> 90:4
<b>361</b> 157:18	<b>4709</b> 3:10	245:10 250:3	<b>5192</b> 6:1
<b>362</b> 157:16,18	<b>4712</b> 3:13	254:4 259:19	<b>5266</b> 6:3
<b>365</b> 53:6	<b>4713</b> 3:15	265:18	<b>5271</b> 6:5
<b>37</b> 47:3 111:11	<b>4714</b> 3:17	<b>50.1</b> 63:4 87:7	<b>5273</b> 6:8
<b>37th</b> 15:13	<b>4716</b> 3:19	166:11 223:14	<b>5274</b> 6:10
<b>38</b> 267:14	<b>4717</b> 3:22	<b>5005</b> 5:17	<b>5277</b> 6:12
<b>397</b> 299:12	<b>4718</b> 3:25	<b>503</b> 39:4 66:8,12	<b>5283</b> 6:15
<b>3989</b> 2:10 45:16	<b>4719</b> 4:4	66:15,18,20,25	<b>5285</b> 6:17
<b>3rd</b> 49:3,5 193:4	<b>4720</b> 4:6	67:2,8,12,22 68:1	<b>5286</b> 6:19
<b>4</b>	<b>4721</b> 4:8 53:20	68:25 69:3 73:15	<b>5287</b> 6:22
<b>4</b> 46:15 133:24,25	190:22	79:20 85:21 86:4	<b>5289</b> 6:24
134:1 292:5,16	<b>4724</b> 4:11	88:22 89:5,10,18	<b>5290</b> 7:1
297:12	<b>4725</b> 4:13	89:23 95:2 96:8,9	<b>5292</b> 57:14
<b>4.8</b> 130:19 131:6	<b>4726</b> 4:15	101:6,12,20	<b>5293</b> 2:7 257:5
265:4	<b>4730</b> 4:17	106:25 107:8,10	<b>5296</b> 198:10,17
<b>40</b> 15:12 35:25	<b>4731</b> 4:20	107:25 108:1,21	<b>5297</b> 60:10 84:1
134:4	<b>4759</b> 4:23	109:5,23 110:15	94:4
<b>41</b> 103:20 263:18	<b>4773</b> 4:25	111:21,24 112:8	<b>5303</b> 49:7
272:18	<b>4780</b> 5:3	112:25 113:7	<b>54</b> 298:5
<b>44</b> 106:11,13	<b>4785</b> 5:5	120:5,11,22,24	<b>55</b> 63:1,19 86:18
119:8,8,9,12,25	<b>4786</b> 5:8	121:8 128:10	87:4 91:8 298:8
120:5 261:19,20	<b>47th</b> 16:4	129:3,4,7,12,18	<b>56</b> 64:4 87:11
261:21 262:9,24	<b>48</b> 34:7 243:11	129:19 131:20	<b>57</b> 87:14 297:6
263:6 264:18	<b>4801</b> 5:12	138:11 159:11,13	<b>58</b> 57:18 87:14
266:3,14,18 269:6	<b>4861</b> 5:14	159:19 168:1,22	<b>59</b> 87:14 298:19
<b>4478</b> 134:10	<b>4th</b> 134:22	170:18 199:18,18	<b>595</b> 294:4,16
<b>450,000</b> 39:7	<b>5</b>	213:18 215:1	<b>5th</b> 14:4
268:12	<b>5</b> 57:24,24 66:1	216:12 222:2,12	<b>6</b>
<b>46</b> 63:9,9 121:17	81:10 84:3 99:9	259:18 261:17	<b>6</b> 59:6 63:14,17,19
<b>4611</b> 10:12	108:11 139:9	263:13 266:10,21	84:3 293:7
<b>4635</b> 7:6 20:16	141:8 297:6	268:11 269:5	<b>60</b> 57:18 68:19
<b>4668</b> 2:13 45:25	<b>5,000</b> 22:22	277:4 284:25	70:16 87:14 111:9
<b>4673</b> 2:15 150:12	<b>5.1</b> 50:18 66:7	<b>5041</b> 5:20	111:10,14 122:8
<b>4678</b> 2:17	206:15	<b>5048</b> 5:22	122:10 228:7
<b>4680</b> 46:24	<b>5.3</b> 65:19	<b>506</b> 229:9	253:19 267:11
<b>4681</b> 2:19	<b>5.8</b> 115:8,13	<b>507</b> 156:3 252:16	268:6,7 298:11,14
<b>4684</b> 2:21 47:8	<b>50</b> 36:1 64:2 68:19	257:21	<b>605</b> 13:12
<b>4690</b> 2:23	122:8,10 135:2	<b>5088</b> 5:24	<b>60602</b> 19:21
<b>4700</b> 2:25	159:20 171:7	<b>5137</b> 55:6	<b>60606</b> 11:4 15:5
<b>4702</b> 3:2	173:7 196:7	<b>5146</b> 56:3	<b>61</b> 67:19 87:14
<b>4707</b> 3:5	223:13,22 224:22	<b>5148</b> 60:9 62:14	<b>62</b> 86:16 297:7
	228:4 232:9 236:8	63:19	

[620 - accomplished]

Page 4

<b>620</b> 17:18	<b>8</b>	297:11	75:8,11 79:16
<b>630</b> 11:18	<b>8</b> 64:17	<b>9/13/19</b> 56:23 61:4	82:16 96:12 100:8
<b>64</b> 216:18	<b>80</b> 215:23,25	298:9,12	113:6 114:3 117:4
<b>640</b> 12:19	223:5 231:7 237:9	<b>9/25</b> 127:7,17	117:16 124:2
<b>650</b> 22:16	237:15,17	128:11	139:1 140:4,6
<b>667</b> 294:6,15	<b>800</b> 152:15	<b>90</b> 11:11 14:11	144:15,18 152:3,8
<b>67</b> 69:16	<b>82</b> 34:13	107:9 111:23	170:10 172:15
<b>7</b>	<b>83</b> 292:18	112:8 129:16	173:5 175:17
<b>7</b> 47:7 134:3,19,24	<b>85</b> 297:8	130:2,6,8,8	186:14,16 189:19
140:10,21 194:25	<b>86</b> 10:4 159:10	167:22 168:22	190:3 191:10
195:17 196:6	<b>87</b> 292:25,25	170:15 253:19	194:12 195:10
198:21 208:1	<b>88</b> 77:7,9 294:6	254:5	197:10 198:4
231:21 232:17,17	297:9	<b>90067</b> 15:23 16:13	199:13 201:1
233:6,10,20,22	<b>9</b>	<b>9019</b> 155:20	204:5 224:9 232:8
234:2 235:1,5	<b>9</b> 37:17 39:4 66:8	282:13,17	235:17 236:4
236:12 237:24,25	66:12,15,18,20,25	<b>9024</b> 228:5,6,13	237:7 240:1 259:8
240:15,21 245:1	67:2,8,12,22 68:1	<b>91</b> 297:10	266:19 283:14
299:19	68:25 69:3 73:15	<b>919</b> 12:11	<b>abrupt</b> 271:4
<b>7's</b> 140:11	79:20 84:3 85:21	<b>93</b> 293:6 297:11	<b>absent</b> 294:1
<b>7.1</b> 50:14	86:4 88:22 89:5	<b>95</b> 267:16 269:1	<b>absolutely</b> 39:23
<b>7.883</b> 265:2	89:10,18,23 94:3	<b>966</b> 129:5	162:17 201:23
<b>70</b> 254:7 258:12	94:13 95:2 96:8	<b>97</b> 66:9,14,21 67:7	235:16 236:2
269:13	101:6,12,20	67:9,25 68:24	<b>abstain</b> 35:1
<b>71</b> 262:1 268:6	106:25 107:8,10	69:8,13 86:7	<b>abstained</b> 52:25
<b>710</b> 114:22 115:1	107:25 108:1,21	110:18 111:2,10	54:19
115:4,11	109:5,23 110:15	112:25 170:20	<b>acadia</b> 2:21 47:7
<b>73</b> 141:20 171:4	111:21,24 112:8	<b>97.5</b> 152:20	48:10
<b>74</b> 294:3	112:25 113:7	<b>975,000</b> 265:3	<b>accept</b> 55:14 65:5
<b>75</b> 32:21 37:6	120:5,11,22,24	<b>99</b> 130:7 167:21	82:17 216:5
40:24,25 73:6	121:8 128:10	253:7	232:22 294:4,23
126:25 129:10	129:3,4,4,7,12,18	<b>9th</b> 12:20 136:8	<b>acceptable</b> 142:13
173:19 174:7	129:19 131:20	188:7 190:20	<b>acceptance</b> 293:7
181:10 202:3	138:11 156:1	191:6	293:12 294:5
244:3 294:17	159:11,13,19	<b>a</b>	<b>accepted</b> 213:12
<b>75201</b> 8:17	168:1,22 170:18	<b>a&amp;a</b> 17:5	272:24 292:18
<b>76</b> 73:25 76:9	195:11 199:18	<b>a.o.</b> 3:12 6:19	293:1,10
<b>767</b> 8:4	214:20 215:1,9	<b>aaert</b> 299:13	<b>accepting</b> 254:3
<b>77</b> 19:19 79:5	222:2,12 246:23	<b>ability</b> 31:15 52:8	295:1,2
<b>78</b> 198:11,17	247:3,6,7,10	112:17 113:3,17	<b>accompanying</b>
292:19	259:18 261:17	113:25 114:6	232:20
<b>79</b> 198:11	263:13 266:10,21	198:4	<b>accomplished</b>
<b>7th</b> 190:20	268:11 269:5	<b>able</b> 24:17 42:22	187:15
	284:25 288:22	46:22 70:1 74:2,6	

<b>account</b> 43:25 63:13,15,23 64:1 68:1,24 77:8,12 77:24 78:10 92:19 98:2 107:2 128:7 159:7 162:2,11 165:16 166:23 171:22 188:3 196:18 198:23 199:19 200:18 209:11 210:22 226:25 227:3,3 244:23 249:16 253:4 259:2,11 <b>accountant</b> 124:5 <b>accountants</b> 99:17 <b>accounting</b> 98:11 98:14,22 99:2 100:12 128:24 199:7 268:9 <b>accounts</b> 77:24 78:10 102:22 103:5,10 104:1,4 104:9,12,13,16,19 105:12,15 128:25 159:6 160:7,19 161:10 162:24 168:24 256:12 258:17,21 259:4,5 277:5,21,23 278:1 <b>accrual</b> 163:24 <b>accurate</b> 80:12 100:1,2 132:4,8 299:5 <b>accurately</b> 103:3 105:12 <b>achieve</b> 147:21 <b>achieved</b> 250:8 <b>achieving</b> 249:22 <b>acknowledge</b> 243:9	<b>acknowledging</b> 203:20 289:10 <b>acquisition</b> 187:7 <b>act</b> 178:5 <b>action</b> 141:2 152:22,23 178:1 178:20 180:1 195:4 204:16,21 205:7,16 <b>actions</b> 70:1 81:4 87:19 139:22,23 142:21 143:19 164:3 196:9 199:20 206:8 <b>active</b> 65:8,11 <b>activities</b> 100:22 <b>activity</b> 99:16,19 100:4,6,9 <b>actual</b> 184:4 <b>actuarial</b> 24:3 <b>ad</b> 14:10 30:13 36:5,7 81:16,22 82:6 83:7,10 114:14 149:14 150:4 172:11 186:20,25 203:18 278:22 290:25 <b>adams</b> 15:3 <b>add</b> 42:16 87:3 95:18 211:21 269:16 <b>added</b> 47:3 252:3 258:5 <b>adding</b> 47:10 102:17 258:4 <b>addition</b> 64:8 169:16 174:6 187:9 271:16 <b>additional</b> 30:21 34:1 43:2,12 55:25 64:5,9 66:4 87:11,17 102:13 102:15,17 103:25	104:6 105:7 106:11 108:20,22 115:13,22 168:2 169:8 171:24 192:23 197:23 200:25 201:11 202:8 231:23 237:8,23 261:19 265:25 267:9 269:11 281:24 <b>additionally</b> 192:5 199:10 200:4 <b>address</b> 28:2 36:25 86:20 87:5 87:11,14,17 137:23 140:17 158:13 204:9 219:15 227:14 291:16 <b>addressed</b> 48:20 115:15,19 116:12 125:3 199:23 210:1 224:7 <b>addressing</b> 28:5 115:3 124:5 257:19 <b>adequacy</b> 34:12 <b>adequate</b> 158:6 178:19 179:24 200:6 210:13,24 212:1 <b>adequately</b> 200:10 209:16 211:20 <b>adjourn</b> 172:17 278:25 <b>adjourned</b> 193:3 <b>adjourning</b> 42:12 42:15 <b>adjournment</b> 43:5 <b>adjudication</b> 118:8,13	<b>adjustment</b> 135:16 <b>adjustments</b> 98:3 <b>adjusts</b> 154:16 <b>admin</b> 14:10 31:10,13 34:6,8 74:18 82:16 133:7 145:17 149:14 159:2 173:20 188:22 190:14,16 190:23 192:2 195:12,22 196:12 198:25 200:1,4 201:3,10 202:4,15 203:16 205:8,18 205:21 206:1,3 207:14 238:1 241:14,17 288:21 <b>administration</b> 148:22 <b>administrative</b> 21:12,20 22:7,8 25:2,9 27:25 28:18,21 30:13,13 31:24 32:2,11,18 35:11,20 36:10 37:4,11 39:12,20 39:25 40:1,2 41:6 41:18 43:16 44:4 53:22 59:25 60:6 73:14,19 74:2,6 74:15,25 75:14,15 75:23 76:2 79:7 79:19 81:12 83:11 84:5,7,11 87:22 88:6,10 92:15,25 94:2,5,7,15,23 95:2 96:4 101:12 101:16 102:1,5,9 102:10,13,15,17 102:19 103:11,20 104:25 105:8 117:12,21 118:9
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[administrative - allowed]

Page 6

118:18,21 123:1 123:13,22 128:4,6 132:2,5,11 133:22 139:1 142:14 143:4,24 144:9 148:25 149:19 150:16 153:22 156:12,17,22 159:20 160:5,8,17 160:23 161:20,25 162:6 163:1,6 164:22 172:7,9 175:22 176:2 180:11 185:9,21 185:24 187:4,9 188:4,10,15,23 189:20 191:17 192:5,21 194:7,10 196:3,4,24 197:5 197:11,17,20 198:12,18,21 199:3,10 202:9,12 202:20 203:3 205:24 206:20 208:20 209:10 212:25 213:15 216:19 217:3,7 220:18 221:5,25 222:24 223:17 224:5 225:3,4 228:2,9 229:2,17 230:17 231:20,24 232:10,15,18 233:9 234:14,22 235:5 236:5,11 237:5,8,13,16 238:11 240:3,7,8 240:12,17,23 241:1 242:5 243:11 246:24 253:14 254:4,23 255:9 256:22,24 257:2,6,8 260:21	262:13,15 266:13 267:12 268:11 277:2 278:11,12 278:20 279:5,8 280:9 281:4,9,21 282:1,5 283:2 291:2 298:18 <b>administratively</b> 134:2,23 211:11 211:12 234:11 235:16 236:2 283:22,23,23 <b>administrator</b> 3:4 15:10 91:1 <b>admins</b> 30:14 116:4,4 153:13 187:17 193:10,24 194:4 195:16 196:18,19 198:5 200:13,15,24 201:5 263:10,15 282:11 288:21 296:6 <b>admitted</b> 60:3 <b>adopts</b> 228:7 <b>adults</b> 283:21 <b>advance</b> 57:23 128:13 205:11 <b>advantageous</b> 194:4 287:10 <b>adversary</b> 205:5 <b>adversely</b> 36:12 36:23 <b>advised</b> 20:11 <b>advisors</b> 2:15 18:9 73:13,17 150:11 <b>advocate</b> 190:25 <b>affect</b> 36:23 38:8 47:12 54:14 79:25 92:21 <b>affiliated</b> 2:6 20:8 57:17	<b>affirmative</b> 178:5 181:9 <b>affirmatively</b> 33:3 173:17 178:2 179:12 295:8 <b>afford</b> 223:1 286:11,12 <b>afternoon</b> 90:24 137:15,17 150:21 186:24 187:2 203:11,14 207:3 212:23 219:23 289:13 291:12 <b>ag's</b> 146:9 <b>agenda</b> 20:12 27:17 45:11,16 47:8 49:1 <b>agent</b> 291:14 <b>aggregate</b> 22:24 110:5 198:24 205:12,15 <b>ago</b> 29:12 145:7 189:7 238:20 243:12 287:18 <b>agree</b> 44:24 74:25 84:14 86:19,25 96:12 119:20,21 172:17 174:19,22 175:6,6 188:4 190:11 196:11,16 199:24 201:4 205:24 236:13 239:6 244:3 245:5 251:12 253:24 265:11 270:5 277:3 <b>agreed</b> 22:12 47:24 60:3 61:19 89:19 119:15,16 136:24 143:8,25 150:14 152:24 155:13 172:14 202:2 220:3	246:24 <b>agreeing</b> 144:21 <b>agreement</b> 21:2 32:18 36:8 47:5 50:3,10,17 51:20 51:21 52:8,10 64:25 99:25 172:11 175:17 180:25 181:8 189:1 190:6,7,9 194:2 197:7,10 205:17 206:1 221:9 254:6 283:24 284:6 <b>agreements</b> 27:1 54:22 142:21 282:15 <b>agrees</b> 119:17 <b>ahead</b> 34:22 48:8 83:23 85:15 86:22 119:7 209:15 <b>aiello</b> 14:23 <b>ain't</b> 287:15 <b>akin</b> 9:1 194:21 195:21 203:12 272:9 286:3 <b>al</b> 1:10 2:1 6:12 <b>alan</b> 140:21 <b>aliano</b> 2:23 19:18 <b>aligned</b> 242:6,7 <b>allen</b> 11:21 <b>allies</b> 193:8 <b>allow</b> 29:25 31:16 52:19 79:9 127:3 140:12 152:1 172:12 180:9 191:1 267:11,16 268:7 <b>allowance</b> 43:5 84:7 94:7 180:4 <b>allowed</b> 21:20,22 22:1 37:5,7 39:8 39:12,20 40:22
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[allowed - applies]

Page 7

41:5,18 42:8 74:6 74:16,18 75:14 82:11 84:10 87:21 96:12 102:19 106:16,16 117:21 127:8 128:4,6 132:11 139:13 143:4,24 144:15 152:15 156:2,4 173:19,20 174:9 174:12 177:11 201:15 215:16 217:8 223:17,20 224:5 225:4 228:3 233:23 237:16 246:25 247:1 254:4 268:13 <b>allowing</b> 50:23 140:2 148:19,20 215:3 <b>allows</b> 51:4,6 84:5 94:5 96:11 194:20 <b>alongside</b> 149:2 199:16 281:5 <b>alpine</b> 2:25 3:13 5:20 18:2 <b>alston</b> 11:8 289:14 <b>alternative</b> 140:9 140:10 194:12 208:1 217:2 243:2 295:25 <b>alters</b> 47:4 <b>ambit</b> 278:2 <b>amended</b> 2:5 4:15 27:18 57:15 222:11 264:13 265:3 271:9 <b>america</b> 12:2 <b>american</b> 7:1 <b>amount</b> 21:12,20 22:13,17 24:8 35:24 37:10 38:19 38:21 57:22 58:11	58:12 64:19,22 70:3 79:21 82:14 84:10 95:19,19 98:8 108:9 109:13 110:4,11 111:4 112:17,23 114:1 115:15 117:6 119:18 125:20 138:16 139:21 159:9 168:3 169:25 173:3,4,19 173:23 174:8,20 176:3 182:6 184:24 193:22 207:14 216:16 229:10 250:13,15 263:6 287:9 292:10,11,12,20 292:21 293:3,8,9 294:3,4,14,25 295:2 <b>amounted</b> 293:6 <b>amounts</b> 68:13 95:20 96:12 103:25 104:6,7 119:15,16,21,22 127:17,19 160:22 227:3 255:15 284:4 <b>amw</b> 17:7 <b>analysis</b> 72:17 73:22 81:16,18,19 81:21 82:2,15 100:25 107:11,12 107:18 108:1,11 108:12,18,22 109:1,2,3,6 124:22 128:6,9 129:12 131:25 135:3,20 139:17 205:20 232:14 233:2,6,25 234:11 235:9,17,19	250:16 256:7,13 256:14 257:23 281:18 <b>analyze</b> 107:10 108:19 <b>analyzed</b> 249:25 <b>analyzing</b> 134:22 <b>andrews</b> 17:3 <b>angeles</b> 15:23 16:13 <b>annex</b> 57:17 58:24 <b>annexed</b> 57:17 <b>announced</b> 22:9 <b>annual</b> 57:25 58:17 62:8 93:17 <b>answer</b> 41:1 69:15 107:20 108:12 109:8 113:10,12 114:4 118:16 122:20 124:1 169:5 185:8 203:5 227:16 <b>answered</b> 58:14 67:16 99:3 105:3 105:4,5 107:19 113:2,11 132:22 <b>answering</b> 103:3 126:13 <b>answers</b> 71:20 <b>anthony</b> 11:14 289:13 <b>anticipate</b> 92:4 <b>anticipated</b> 23:23 103:24 106:12 119:9 124:19 261:20 265:25 267:9 268:22 <b>anticipating</b> 70:16 <b>antiquated</b> 98:11 98:21 99:2 <b>anybody</b> 195:2	<b>anymore</b> 170:10 224:17 227:20 <b>anything's</b> 72:13 118:7 <b>anytime</b> 148:10 <b>anyway</b> 49:18 148:1 252:21 275:16 <b>apa</b> 81:2 107:3 110:15 112:18 113:19 114:1 138:11 139:25 155:9 159:14 162:21 165:15 <b>apart</b> 166:13 220:7 <b>apologize</b> 45:8 83:21 130:9 221:18 261:4 <b>appeal</b> 118:6 169:20 216:21,22 217:17,19 218:20 218:21 248:19 <b>appealable</b> 115:1 <b>appear</b> 126:9 162:1 <b>appearance</b> 188:7 289:1 <b>appeared</b> 190:5 213:15,17 <b>appearing</b> 288:25 <b>appears</b> 27:2,9 210:5 <b>appellate</b> 215:4 217:19 <b>applicable</b> 30:17 47:2 52:16 178:21 180:2 200:5 <b>application</b> 167:23 <b>applied</b> 273:23 <b>applies</b> 273:22,23
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[apply - attended]

Page 8

<p><b>apply</b> 273:9 282:11,19 <b>appoint</b> 149:1 <b>appointed</b> 199:14 <b>appointment</b> 198:18 <b>appreciate</b> 23:24 149:6 208:16 264:20 <b>approach</b> 21:5 133:2 214:17 <b>approached</b> 196:14 <b>appropriate</b> 26:6 26:9 201:10 205:7 279:1,18 <b>approval</b> 51:23 146:9 247:14,17 278:25 <b>approvals</b> 142:16 146:6,8,8 <b>approve</b> 32:11,12 32:13 173:12 247:18 <b>approved</b> 150:24 159:17 293:18 <b>approving</b> 32:9 172:21 297:17 <b>approximate</b> 63:10 108:20 <b>approximately</b> 36:2 63:4,7,9,25 64:2 68:18,21 70:20 74:23 80:24 84:23 95:16 110:15 111:7 114:22 116:17 117:2,7 130:16,19 139:11 152:16 159:10 223:11 <b>april</b> 213:16 215:21</p>	<p><b>archer</b> 11:16 <b>areas</b> 75:2 <b>arguably</b> 46:13 <b>argue</b> 29:8 52:8 159:12 269:21 <b>argued</b> 168:14 233:7 <b>argues</b> 163:14 <b>arguing</b> 168:16 <b>argument</b> 22:6 29:15 34:8 41:20 53:18 137:4,8 166:14,15 217:3 217:18 219:1,4 225:19 231:16 232:14 237:18 246:10,22 296:8 <b>argument's</b> 34:20 <b>arguments</b> 34:6 186:19 <b>arises</b> 221:4 <b>arm's</b> 27:4 207:18 <b>arnold</b> 15:25 288:24,24 <b>aronoff</b> 10:7 <b>ashford</b> 12:1 <b>asia</b> 243:15 <b>aside</b> 29:6 32:15 125:19 138:11 204:6 <b>asked</b> 57:12 62:7 86:10 88:22 89:9 89:12,14 93:13 99:4 101:2,5,8,11 103:9 105:3 107:19 118:25 119:3 182:16,22 188:12 189:6,24 197:1 202:4 251:23 252:1,5 255:18 256:1 277:18</p>	<p><b>asking</b> 73:24 83:5 89:2 94:2 102:8 123:25 130:5 132:21 194:1 211:23 235:11 246:1 256:13 282:9 <b>asks</b> 208:2 <b>aspect</b> 26:11 153:5 <b>aspen</b> 5:19 14:18 <b>asr</b> 275:12 <b>assert</b> 47:14 <b>asserted</b> 81:21 111:2 141:1 152:17 187:8 270:4,6 277:22 278:4 <b>asserting</b> 32:22 52:6,17 <b>assertion</b> 121:6 142:14 <b>asset</b> 43:10 64:5 66:4 74:21 211:8 254:6 <b>assets</b> 43:11 52:17 64:9 65:19,23 79:7,10 80:1,7,15 80:23 82:18 89:16 124:3 134:21 139:14 140:5 158:3 160:6 163:19,20 199:7 206:17 208:21 210:8,17,19 211:1 211:21,21 212:2 222:23 231:23 239:7 248:20 272:14 274:2 <b>assigned</b> 47:1 52:9 <b>assignment</b> 54:17</p>	<p><b>assist</b> 149:3 175:23 176:1 <b>assistance</b> 73:13 <b>assisting</b> 153:1 <b>associated</b> 29:7,9 183:16 <b>association</b> 4:10 17:16 291:14 <b>assume</b> 71:20 81:2 161:15 252:6 257:16 259:21 260:24 <b>assumed</b> 52:9 135:15 235:19 <b>assuming</b> 23:19 24:12 25:20 38:20 40:4 44:25 79:19 80:11 119:15,16 137:9 170:17 182:20 185:8 196:3 258:2 272:13 <b>assumption</b> 54:17 71:5,6 72:4,8 79:25 159:17 215:23,25 216:1 <b>assumptions</b> 248:13,13 <b>assurance</b> 185:9 <b>asymmetric</b> 4:8 187:6 <b>atlanta</b> 16:23 <b>attached</b> 192:13 192:13 291:24 <b>attack</b> 252:18 <b>attacked</b> 250:17 285:6 <b>attacking</b> 285:8 <b>attempt</b> 230:3 <b>attend</b> 42:22 <b>attended</b> 35:15 36:5</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------



<b>attention</b> 62:14 67:19 69:16 73:6 77:6 97:16 100:23 103:16 126:19 183:24,25 198:8 <b>attorney</b> 95:13 <b>attorney's</b> 10:2 208:15 <b>attorneys</b> 8:3,14 9:2 11:2,9,17 12:2 12:10 13:2,10,18 14:2,10,18 15:2 15:10,19 16:2,10 16:19 17:3,16 18:2,9,16 19:2,11 19:18 42:21 219:25 <b>attributable</b> 109:18 110:6 <b>august</b> 190:21 <b>ausa</b> 10:7 <b>aust</b> 9:18 <b>authority</b> 255:11 <b>authorization</b> 255:11 <b>authorized</b> 23:4 <b>automatic</b> 37:4,6 52:15 243:12,14 271:7 <b>automatically</b> 243:20 <b>auxo</b> 17:8 <b>availability</b> 92:21 196:23 <b>available</b> 22:2 37:10,11,23 38:10 41:18 42:6 44:3 83:10,11 92:12,13 164:1,25 165:2 168:22 169:9 182:22 195:15 196:12,18 205:9 205:15 206:3,5,13	223:14 227:4 <b>avenue</b> 8:4 10:11 11:11,18 12:19 13:12,19 14:3,11 14:19 17:9,18 190:3 <b>avoidance</b> 275:25 <b>aware</b> 42:20 51:11 58:6 83:13 92:18 95:19 97:9 106:10 115:3 122:2 123:17 180:12 210:1 212:3 219:9  <b>b</b> <b>b</b> 1:23 23:7 30:23 39:4 45:25 57:17 58:24,24 60:19 66:8,12,15,18,20 66:25 67:2,8,12 67:22 68:1,25 69:3 73:15 79:20 85:21 86:4 88:22 89:5,10,18,23 95:2 96:8,9 101:6 101:12,20 106:25 107:8,10,25 108:1 108:21 109:5,23 110:15 111:21,24 112:8,25 113:7 120:5,11,22,24 121:8 128:10 129:3,4,7,12,18 129:19 131:20 138:11 159:11,13 159:19 168:1,22 170:18 192:15 199:18,18 213:18 215:1 216:12 222:2,12 257:21 259:18 261:17 263:13 266:10,21 268:11 269:5	272:20,21 274:17 277:4 284:25 298:3 <b>back</b> 20:23 31:22 43:2 81:20 83:14 86:17 103:7 106:23 122:19 137:3,11,12,15 151:23 158:19 164:24 165:23,25 168:23 170:1 185:4 192:20,25 205:10 241:19 256:21 259:10 276:14 <b>backdoor</b> 218:20 <b>backdrop</b> 286:17 <b>background</b> 150:4 221:3 <b>backing</b> 260:11 <b>bad</b> 159:16,16 226:9,10 279:7 <b>balance</b> 70:24,25 175:14 <b>balances</b> 98:1 <b>balancing</b> 230:17 <b>ball</b> 249:4 <b>ballad</b> 178:6 <b>ballard</b> 12:9 48:10 <b>balloting</b> 55:11,12 <b>ballots</b> 55:17 298:7 <b>bank</b> 166:23 <b>bankr</b> 275:14 <b>bankruptcy</b> 1:2 1:16,25 37:6 71:9 72:18 97:5,8,14 98:15 99:1 121:5 191:11 203:25 220:12,12 222:7 222:11,18 225:6,8 238:11 243:19	257:7 <b>bapcpa</b> 222:11 <b>bar</b> 101:3,5,8,15 101:16,20 102:4,9 118:17,21 160:5,8 163:6 234:1 256:22,24 257:2,6 259:20 270:6 278:11 <b>bartels</b> 140:23 <b>base</b> 57:19,20,20 57:25 58:3,17 59:8 62:8 71:6 <b>based</b> 29:11 64:22 68:15 69:25 71:24 76:9 80:3 89:1 93:17 95:14 108:3 108:15 114:25 125:21 129:8,24 130:11 160:18 200:1 212:15 214:19 217:3 229:14 233:17 234:9,20 236:14 239:19 240:4,18 243:4 244:12 249:19 251:21 254:3 257:11,13 258:7,7,9,10,24 270:24 293:11 <b>basic</b> 181:15 <b>basically</b> 30:9 45:18 143:22 171:5 177:7 178:3 200:8 218:3 222:12 223:22,25 230:24 231:12 253:18 264:6 267:2 270:17,19 284:1,16,21 <b>basing</b> 270:14 <b>basis</b> 57:23 76:19 80:2 99:20 124:23
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

154:23 184:4 199:9 215:18,19 226:13 227:24 230:15 231:15 239:4 253:10 256:4,11 264:8,12 269:21 270:8 276:8,13 286:20 288:10 <b>battaglia</b> 15:9 90:25 <b>bears</b> 164:21 <b>beauty</b> 17:8 <b>beck</b> 7:24 299:3,8 <b>bedding</b> 16:19 289:5 <b>began</b> 191:23 <b>beginning</b> 73:11 132:2 222:25 227:8,19 228:1 229:21 <b>behalf</b> 2:13 20:7 48:10,10 51:18 61:10 90:19 125:1 150:4 166:8 186:25 198:5 203:12 207:4 212:24 276:25 288:25 289:14 290:25 291:13 <b>belabor</b> 275:8 <b>belief</b> 119:22 <b>believe</b> 22:15 23:3 29:12 31:15 49:22 52:21 54:4 59:10 59:25 63:12 65:24 66:1,20 69:11 70:14,16 71:2,9 74:1,5 75:25 76:8 79:6 80:8 81:19 84:4,18 88:23 89:9 90:21 92:12 94:4,15 102:16	110:14 115:14 116:17 121:10 123:8 133:11 138:18,25 139:6 139:14 140:14 144:13 153:5 157:3 159:11 162:19 165:21 166:5,6 168:8 172:9,21 173:11 174:24 180:2 184:8 187:16 195:17 200:11 202:11,18 205:17 209:14 212:16 222:6 228:12 233:11 234:1,9,11 235:19 237:11,15 238:25 242:25 243:1,24 244:25 246:12,13,15 247:21 249:25 250:1,21 251:22 258:24 262:16 267:2 270:24 271:2,8 272:9 276:11 286:14 295:14 <b>believed</b> 152:6 196:2 256:10 <b>believes</b> 66:25 67:12 200:25 <b>belong</b> 168:10 <b>bench</b> 137:20 <b>bender</b> 15:18 <b>beneath</b> 130:20 <b>beneficial</b> 193:13 193:14 205:18 <b>beneficiaries</b> 24:14 25:1 279:5 295:19 <b>benefit</b> 10:17 11:2 21:13 149:5 179:6	188:24 196:13 202:5 207:4 280:12 <b>benefiting</b> 227:5 <b>benefits</b> 7:6 20:14 21:14,21,24 22:6 22:14,17,22 23:6 24:19 26:14 151:9 153:3 155:2,5 202:11 204:17 295:7 <b>benzija</b> 15:9 90:25 <b>best</b> 23:24 24:10 65:16,22 66:4,11 70:5 140:3 187:16 187:18 189:10 190:24 202:25 203:2,2 205:3 220:4 <b>beth</b> 289:4 <b>better</b> 65:5 75:18 76:25 84:21 100:3 115:20 135:11 182:13 191:21 192:12 194:10,14 207:25 231:24 232:9 236:12 245:11 280:2,16 291:8 <b>beyond</b> 85:1 112:19 153:4 249:5 260:15,17 <b>bh</b> 7:1 <b>bi</b> 99:19 <b>bid</b> 283:18 <b>big</b> 113:21,23 132:17 195:1 196:25 197:6 232:3 241:11 252:11 254:25 265:13 285:12	<b>biggest</b> 24:7 191:6 195:23 198:1 <b>bill</b> 56:1 278:9 <b>billion</b> 42:24 75:22 97:25 105:23 115:8,13 121:19 122:3,9 124:20 125:1 152:17 204:19 207:8 239:22 250:3 253:13,14 265:14,14,18 <b>billions</b> 98:5 116:11 239:20,21 <b>bind</b> 272:21 <b>binder</b> 214:8 <b>binding</b> 29:8,16 142:23 239:1 <b>bird</b> 11:8 289:14 <b>bit</b> 29:22 158:18 221:14 252:19 <b>blackline</b> 21:4,4 <b>blank</b> 57:22 <b>blanket</b> 193:19 199:24 <b>blew</b> 291:25 <b>blindly</b> 182:21 <b>block</b> 207:22 <b>blvd</b> 15:21 <b>board</b> 23:18 57:11 57:19,21 58:1,4 58:22 62:9 93:14 141:3 142:1,1 197:24 287:2 294:12 <b>boards</b> 146:8 <b>body</b> 251:2 <b>bogus</b> 105:14 <b>boil</b> 223:15 <b>bond</b> 217:19 <b>bondholder</b> 173:8 <b>book</b> 61:15,17 136:24 161:11
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<b>books</b> 97:8,14 102:25 103:13 104:9,12 105:11 107:15 161:13 162:1 169:13 270:9 277:6,12 <b>borderline</b> 152:4 <b>bottom</b> 84:4 94:14 97:18 129:14 133:18 134:16,16 134:21 136:9 198:16 <b>bought</b> 121:3 125:11 <b>bound</b> 272:12 276:8 <b>box</b> 103:22 124:24 177:16,18 252:15 262:15 <b>boxing</b> 3:21 <b>brainers</b> 253:6 <b>brauner</b> 9:8 <b>brave</b> 242:20 <b>breach</b> 7:24 299:3 299:12 <b>breaching</b> 273:16 <b>break</b> 137:3 150:11 246:4 <b>brian</b> 11:6 60:8 61:4 207:3 297:7 297:8,9 298:11,14 <b>bridge</b> 188:13 <b>brief</b> 20:19 21:8 85:12 140:18 192:14 203:13 207:5 208:16 209:4 219:24 274:10 276:18 292:2 <b>briefing</b> 59:5 154:1 155:19 <b>briefly</b> 88:18 213:1	<b>brill</b> 15:18 <b>bring</b> 31:8 70:2 74:22 156:13 231:22 250:5 285:24 <b>bringing</b> 206:12 248:20 <b>brings</b> 284:23 <b>brixxmor</b> 12:10 <b>broad</b> 219:17 <b>broader</b> 82:2 276:17 <b>broadly</b> 173:16 <b>broadway</b> 18:3,18 <b>broke</b> 291:22 <b>brought</b> 167:21 238:20 246:5 285:13 <b>brouhaha</b> 241:11 <b>bryant</b> 9:4 16:3 <b>bst</b> 6:7 <b>buchanan</b> 12:18 <b>bud</b> 216:3 <b>budget</b> 123:12,17 199:4 232:3 <b>budgets</b> 199:6 <b>build</b> 154:21 219:18 <b>building</b> 9:13 16:20 26:10 176:21 207:22 <b>bulk</b> 283:2 <b>bullish</b> 204:20 <b>bumped</b> 253:2,3 <b>bunch</b> 35:22 75:14 160:9 219:24 <b>burden</b> 38:2 44:11 138:23 186:8 246:13 254:17 255:21,24 257:14	<b>burn</b> 286:2,3 <b>burning</b> 287:13 <b>bus</b> 123:11 <b>business</b> 31:20 41:9 71:21 162:23 222:1,3 288:17 <b>businessman</b> 95:13	<b>careful</b> 153:18 159:1 <b>carefully</b> 73:14,18 232:14 245:25 286:18 <b>careone</b> 276:13 <b>carl</b> 3:4 15:10 90:25 208:12 <b>carr</b> 140:22 <b>carried</b> 186:8 <b>carve</b> 29:5 50:24 63:13,15,22,25 77:8,12,24 78:10 142:16 196:17 200:18,19 223:13 223:22 224:23 226:25,25 227:2,3 227:5 228:4 229:3 229:5,8,9,16 237:24 <b>carved</b> 276:16 <b>carves</b> 274:13 <b>case</b> 1:4 22:13 30:8 35:23 39:23 44:8 47:22 65:5 78:2 88:12 102:11 102:20 117:24 118:18 132:1,6 133:23 158:21 159:5 160:4 179:23 187:19,21 187:24 188:8 190:4,5 191:21,23 193:12,16,16,17 196:5 198:7 200:17 201:2 202:24 207:8 211:11 213:14 217:4 220:9 221:8 221:19,25 222:4 222:14,21,25 225:22 227:8,19 228:1,2 229:21
		<b>c</b>	
		<b>c</b> 8:1,8 9:7 12:15 20:1 52:25 134:7 136:7 165:10 229:9 299:1,1 <b>ca</b> 15:23 16:13 <b>calandriello</b> 15:1 <b>calculations</b> 102:18 <b>calder</b> 64:13,14 64:15 <b>call</b> 21:18 26:12 35:15 55:24,25 56:1 60:8 72:7 80:21 90:3 138:8 162:24 188:18,23 192:6 283:22 284:4 <b>called</b> 22:11 109:18 110:4 154:14 188:12 275:13 <b>calls</b> 188:10 <b>canyon</b> 239:3 <b>cap</b> 22:15,24,24 <b>capable</b> 287:19 <b>capital</b> 2:15 4:19 16:10 18:9 150:11 187:7 <b>capped</b> 40:24 174:7 <b>care</b> 4:6 6:14 116:4 251:9 <b>cared</b> 189:25	

232:12,21 233:20 242:19 247:4,22 248:2,2 249:11,11 252:11 258:25 272:1 273:12 275:9 276:12,13 277:7 281:13 287:8 292:18 <b>cases</b> 29:23 72:18 140:2,3,6 155:11 155:24 159:3,3 164:9 186:4 200:21 205:22,22 207:11,23 208:2 220:16 221:5 222:9 248:16 249:2,5 285:12 286:20 292:15 293:24 294:18,20 <b>cash</b> 37:10,20,21 37:22,23 38:3,9 38:12 42:6,7,9 63:2,5,8 64:8 80:12,14 87:5 91:23 92:2,6,8,9 134:20 143:23,24 156:3,7,16,16 157:8 163:16 165:7,20 166:6,9 166:10,19,22 168:6,11 169:13 169:24 170:9 189:19 194:6 195:25 196:7,8,10 197:4 198:22 200:25 205:9 206:13 211:4,5,6 212:9 223:12,14 231:18 284:1,4,20 285:17 287:10,13 <b>catch</b> 177:7 179:13,14,15	<b>catches</b> 181:12 <b>catching</b> 179:11 <b>categories</b> 270:18 <b>category</b> 34:25 35:1 <b>caught</b> 84:12 125:12 237:9,12 <b>cause</b> 36:16 244:19 <b>causes</b> 141:2 152:22,22 204:16 204:21 205:7,16 <b>cautiously</b> 202:16 <b>cavaliere</b> 18:6 <b>caveat</b> 34:23 <b>cent</b> 236:15 <b>center</b> 19:3,12 <b>cents</b> 37:5,7 40:18 177:10 181:21 206:4 223:4,5 224:4 233:9,10 234:25 236:8,9 237:9,10,15 243:21 280:5 283:20 286:8,11 286:12,15 <b>century</b> 5:2 11:9 16:11 289:14 <b>cert</b> 299:12 <b>certain</b> 32:22 33:21,22 37:10 50:24 101:3 122:16 133:23 154:16 155:17 161:21 194:19 242:6 247:5 282:15 <b>certainly</b> 29:10,20 33:17 59:24 138:4 144:6 152:4 156:10 157:24 158:24 159:4 160:21 162:3,4	163:3 164:19,21 170:7 172:22 180:15 183:2 184:7 185:1 186:13,15 190:25 194:13 195:13 202:5 215:24 274:6 281:6 288:16 <b>certified</b> 299:13 <b>certify</b> 299:4 <b>cetera</b> 26:16 182:24,25 257:8 272:22,22,22 278:4 <b>ch</b> 2:2 7:3 <b>chain</b> 222:15 <b>challenge</b> 171:1 253:15 <b>challenged</b> 138:4 138:7,10 139:16 139:19 151:17 <b>chamber</b> 191:4 <b>chamber's</b> 191:14 <b>chambers</b> 10:4 20:11 35:15 238:19,20,25 <b>chance</b> 76:6 187:16 219:14 245:19,25 246:3 279:1,22,24 296:2 296:2 <b>change</b> 34:14 42:12 43:11,21,24 53:3 56:18 61:1 90:14 130:10 243:13 282:20 <b>changed</b> 91:13 271:7 <b>changes</b> 21:5 34:1 34:2 48:14 204:8 221:14	<b>changing</b> 43:19 <b>chantelle</b> 12:16 <b>chapter</b> 2:5 21:11 23:2,10 57:16 140:10,11 145:21 156:15 158:21 194:25 208:1 221:25 222:8 231:21 232:17,17 233:2,6,10,20,22 234:2 235:1,5 236:12 237:24,25 240:15,21 245:1 <b>charge</b> 73:21 <b>charles</b> 13:23 <b>chart</b> 47:6 48:18 48:25 49:23 53:19 103:22,22 105:22 120:8 124:18 126:20 160:18 165:16 260:14,17 260:19,20 261:8 261:17,17 264:25 265:17 267:20,22 269:18 277:19 291:24 292:15 <b>charts</b> 182:7,8 252:13 <b>check</b> 147:1,11 177:16,18 252:15 262:14 281:2 282:7 <b>checked</b> 103:12 105:8 124:24 <b>checks</b> 169:12 <b>chelsey</b> 4:2 <b>cherokee</b> 187:6 <b>chicago</b> 11:4 15:5 19:21 <b>china</b> 283:15 <b>choice</b> 101:14 183:16,18 184:4 184:10 185:13
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[choice - claims]

Page 13

223:21 284:19	172:10 173:20	66:15,25 67:8,12	121:15,18,19
<b>choices</b> 284:15	174:8,12,15,17	68:1,25 73:7,14	122:1,4,12,23
<b>chose</b> 173:1	177:11 181:21	73:15,19,22 74:3	123:2,14,14 124:5
<b>chosen</b> 199:22	185:24 187:4	74:3,7,15,25	124:12,16 125:8
<b>christopher</b> 19:8	194:8,20,21,22,23	75:14,15,23 76:3	125:10,15,18,22
<b>circled</b> 192:20	195:3 200:2 202:4	76:16 77:14 78:12	125:23 126:3,5,14
<b>circuit</b> 40:7	204:18,19 208:20	78:13,14,16,16,17	126:15 127:4
178:22	208:23,23 209:5	78:20,21,22 79:7	128:7 129:3,4,7
<b>circuits</b> 151:21	209:14,18,21	79:20 81:21 82:1	129:12 130:16,22
<b>circular</b> 212:4	210:2 212:5,6	82:1,5,7 83:12	131:6,9,12,14,20
<b>circulation</b>	215:3,16,16 225:4	84:5,8,10,24	132:11 134:20
213:25	229:11 233:25	85:21,23 86:4	138:15 139:1,12
<b>circumstances</b>	239:25 246:20	87:21,22 88:23	139:13 140:8
30:18	252:5,11,16 253:5	89:5,10,12,15,23	144:10 147:8
<b>circumvent</b> 54:16	253:7,16 255:4,5	91:10,16,20,24	149:4 150:16,25
<b>circumventing</b>	255:9,13 256:11	92:15,22 93:2	151:25 152:17,22
280:3	257:25 259:6	94:5,8,15,24 95:2	152:23 153:22
<b>cited</b> 248:16	261:1,3,5 264:8	95:3,17,18,19	156:2,5,10,12,17
276:12	267:8,12,25	96:9,9 100:24	158:17,20 159:7,9
<b>citron</b> 13:9 35:8	268:12 269:23	101:3,6,9,12,12	159:19,20,21,22
57:8 62:6 93:12	270:12,16,16	101:20 102:1,5,9	160:1,5,8,9,18
<b>civil</b> 228:7	278:8,12,15	102:10,14,15,18	161:10 162:6
<b>claim</b> 21:19,20,24	280:10 283:7	102:19,24 103:9	163:6,10 164:18
21:24 22:8,12,13	284:15,16	103:11,17,21,22	168:1,22 170:18
22:17 26:15 35:11	<b>claimant</b> 21:23	103:24 104:5,9,14	172:7 173:18,20
37:5,7 39:7,9,12	39:21 212:25	104:15,25 105:8,9	175:20,22 176:3,6
40:23 42:8 43:5	<b>claimant's</b> 108:3	105:23 106:5,13	177:3 180:4,11
53:22 81:12 82:11	<b>claimants</b> 14:10	106:24,25 107:8	186:13 187:9,10
88:6,10 91:18	25:2,10 28:18	107:10,25 108:1	190:1,17 193:12
92:10 94:3 96:4	29:21 30:13 60:1	108:15,20,21	193:22 194:3,5,18
101:16 104:19	60:6 66:21 82:16	109:5,13 110:16	195:1,6 196:3,4
105:14 106:19	92:25 94:23 95:2	111:21,24 112:25	197:3,12,19 199:3
111:5 112:7 115:2	114:14 122:6	113:7 114:22	199:21 200:22
115:5,22 117:2	149:19 186:20	115:2,8,12,13,17	201:15,18,22
119:17,18 120:10	194:1,16 209:10	115:18,20 116:2,3	202:2,6 207:8,8
120:10,22 121:1,9	223:20 298:18	116:3,7,9,15,16	207:14,15 215:1
122:3,8,17,22	<b>claiming</b> 121:4,7	116:18,23 117:6,9	215:23,23 216:1
123:7,13,19,23	<b>claims</b> 21:22 22:1	117:11,12,12,15	217:7,7 218:9
124:25 125:1,13	22:3,5,7,23,23	117:16,20,21,25	220:19 222:4
126:4,8,10 131:1	25:5 35:22,22,24	118:2,8,9,13,14	223:18 224:16
144:15 145:17	35:25 36:2 39:2,4	118:18,21 119:11	225:10 228:3
152:16 158:22,23	40:3 41:6,7,18	119:13,15 120:6	229:23 232:20,22
160:24 161:5	50:5,24 51:1 52:5	120:11,18,24	233:23 234:4,5,17

234:18,23,24,25 235:9,18 236:19 237:5,5,16 238:8 239:7,23 240:3,7 240:8 242:7 243:11 246:24 249:12,18,20,20 250:25 251:2,24 252:12,14 253:1 253:14 254:20,24 256:5,8,11 257:2 257:6,8,15,18,21 257:22 258:14,17 259:11,18,24 260:1,9,12,17,21 260:21,22,23 263:24 264:1,2,11 264:24 265:15 266:24 269:24 270:2,3,4,8 277:4 277:6,9,13,20,21 278:2,3,4,14 280:11 281:4,8,9 281:12,19,21 282:1,5,10 283:8 283:17 284:9,25 288:18 292:6,13 292:14,16 294:21 294:23 295:11 <b>clarification</b> 166:9 274:11 <b>clarified</b> 53:5 <b>clarify</b> 52:13 87:3 <b>clarifying</b> 54:10 273:13 <b>class</b> 21:13,16 22:10,19 292:5,16 293:11 294:23 295:7,13 <b>classification</b> 259:14 261:22 262:3,12	<b>clauses</b> 51:21 <b>clear</b> 26:24 30:20 34:15 35:17 36:10 39:24 47:21 51:14 54:13 67:5 72:1 164:13,16 170:21 172:6 184:10 187:5,11 194:13 205:20 236:4 276:10,14 284:22 <b>clearly</b> 31:23 181:7 197:16 207:25 276:11 288:10 <b>cleary</b> 13:1 <b>clerk</b> 55:5,16 137:20 298:6 <b>client</b> 39:8,11 41:12 91:19 209:14,15,16,17 211:22 217:22 239:25 244:7,8 262:22 268:11 278:13,15 279:11 279:14 <b>client's</b> 40:25 91:18 <b>clients</b> 173:6 187:9 189:22,25 190:1,17 191:3 202:6,7 220:3,5 234:24 245:5 283:19 285:18 286:6,8 288:9,9 <b>clock</b> 149:8 <b>clockwork</b> 223:6 <b>close</b> 31:20 36:22 146:9 229:20 <b>closed</b> 190:15 <b>closing</b> 104:1,7 169:13,13 <b>code</b> 37:6 143:6 145:25 222:7,11	225:15 226:11 238:11,16 243:20 246:23 247:3 271:25 275:24 279:13,14 280:3 <b>cold</b> 280:19 <b>collaborative</b> 23:22 <b>collapsing</b> 147:22 <b>collateral</b> 208:18 209:19,23 210:12 212:8 <b>colleague</b> 275:10 <b>collect</b> 251:14 273:17,19 <b>collectability</b> 250:13 251:5 <b>collection</b> 250:10 <b>colon</b> 14:7 <b>color</b> 42:16 <b>column</b> 127:2 129:2 135:15 <b>combined</b> 189:17 <b>combining</b> 272:8 <b>come</b> 31:16 40:1 60:14 64:20 65:9 74:19 81:2 131:25 137:3,11,12 139:23 140:4 144:11 149:19 153:13 155:22 157:14 173:12,15 178:23 180:8 182:5 184:7 191:8 191:20 193:22 195:15 201:8 203:1 204:16,24 206:14 209:10 212:18 225:16 240:4,6 241:19 242:22 246:19 252:10 274:6 276:14	<b>comes</b> 164:18 243:1 281:9 <b>comfort</b> 250:7 255:8 <b>comfortable</b> 200:15 <b>coming</b> 171:8 175:13,13 206:16 223:25 232:16 239:4 <b>commence</b> 199:1 <b>comment</b> 42:18 130:22 245:8 <b>comments</b> 35:17 186:18 206:23 207:6 208:17 219:24 252:7 292:3 <b>committee</b> 3:2 9:2 19:11 20:23,24 21:1,1 22:4 23:1,4 23:18,21 26:3,3 28:15,19 48:18 79:17 81:17 122:13 139:6 144:8 145:6 148:21 149:2 151:14 152:7 154:24 155:12,16 155:21 159:1 160:4 173:9 191:9 196:22 197:15 198:24,25 199:8 199:17,17 202:1 203:12 204:20,22 207:13 222:25 233:7 234:10 235:12 240:24,25 241:7,9,22 249:15 278:22 281:5,6 297:19 <b>committee's</b> 122:16 140:22
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

196:16 204:10 235:3 249:14 <b>common</b> 190:6 <b>communications</b> 71:10 <b>community</b> 3:15 5:16 11:17 15:2 49:23 <b>companies</b> 71:8 203:25 236:19 <b>company</b> 2:10 17:4 35:9 45:15 98:16 114:12 128:14 175:24 222:5,16 235:11 289:5 <b>company's</b> 43:10 <b>comparatively</b> 195:22 <b>comparing</b> 108:23 <b>comparison</b> 207:5 <b>compelled</b> 284:1 <b>compelling</b> 232:21 <b>compensated</b> 200:10 <b>compensation</b> 57:19,19,20,25 58:3,7,9,17,25 59:1,3,7,8,9 62:9 93:14,17,22 141:4 141:25 142:25 200:6 271:9 <b>competing</b> 172:25 <b>compiled</b> 107:24 <b>complaint</b> 71:16 249:6,19 250:16 250:18,20 <b>complaints</b> 71:20 145:12 206:9 <b>completed</b> 71:22 72:2,15 108:23 111:18	<b>completely</b> 30:17 111:25 224:6 236:25 273:3 <b>complex</b> 125:18 126:2,14,15,15,17 158:21 <b>complicated</b> 50:10 126:11 <b>component</b> 195:25 <b>compounded</b> 151:25 <b>comprised</b> 35:21 139:5 187:5 <b>compromise</b> 193:6,11 205:8 284:16 <b>compromised</b> 151:13 <b>compromising</b> 40:5 <b>compute</b> 34:22 <b>conceding</b> 210:3 <b>conceivable</b> 160:21 <b>conceivably</b> 143:10,10 <b>concept</b> 196:21 <b>concern</b> 25:1 83:9 113:20,21,23,23 114:16,17 191:6 198:13 210:18 213:2 278:21 283:11 <b>concerned</b> 31:10 32:4 89:20 113:24 114:3 197:18 211:16,19 212:4 212:15,17 247:3 248:21 273:8 274:4 276:9 296:9 <b>concerning</b> 114:6	<b>concerns</b> 112:17 113:17 114:7 140:5 204:10 <b>concession</b> 192:24 <b>conclude</b> 140:6 <b>concluded</b> 72:19 100:2 138:1 155:11 269:20 296:11 <b>concludes</b> 136:19 <b>conclusion</b> 64:20 155:24 <b>conclusions</b> 88:5 <b>condition</b> 114:19 142:9 <b>conditioned</b> 247:14 <b>conditions</b> 141:19 144:7 <b>conducted</b> 24:3 81:21 <b>conducting</b> 136:12 <b>conference</b> 114:14 191:4,15 218:7 238:20,25 287:15 <b>conferences</b> 218:5 <b>conferring</b> 289:11 <b>confi9mation</b> 155:7 <b>confidence</b> 105:11 245:4 <b>confident</b> 140:1 <b>confidential</b> 36:6 36:8 199:9 <b>confirm</b> 31:23 38:20 140:12 141:6,14 143:15 144:22 148:11 150:11,18,20,23 155:11 242:25 244:25 248:9	<b>confirmation</b> 2:12 5:17 20:11 23:1,2 23:10 27:18 28:1 28:25 29:1,14 30:4,21 31:9 37:19 38:7 41:20 46:1 47:3 55:2 56:16 58:2,19 59:4 60:23 90:12 103:25 115:16,19 115:24 136:21 137:4 138:22 140:14,18 141:16 142:11 151:2 156:7 172:14 173:13,21 185:7 186:20,21 190:22 192:14 193:2 195:12 197:16 198:19 200:19 205:20 208:3 209:4,12 217:25 265:15,20 277:1 278:24 280:4 285:21 292:2 <b>confirmed</b> 46:25 48:12 146:11 185:12,19 188:14 208:3 224:16 272:21 275:17 278:9 <b>confirming</b> 140:1 203:21 205:23 213:11 217:3 238:23 <b>confirms</b> 224:19 <b>conformation</b> 46:4 <b>confuse</b> 226:1 <b>congress</b> 26:24 222:10,12 247:12 247:20
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[connection - correct]

Page 16

<p><b>connection</b> 35:14 57:15 84:6 94:6 126:14 132:15 133:11 136:20 151:1 205:19 252:13</p> <p><b>consensual</b> 152:25 173:23</p> <p><b>consensually</b> 174:19,22 175:20</p> <p><b>consent</b> 23:4 27:25 28:17,21 29:9,17,20 30:16 30:17 31:11 32:12 53:23 74:19 81:12 82:14 84:5 94:5 94:25 96:11 122:17 145:17 148:25 150:16 155:17 156:12 161:19 164:22 172:8,10 178:1,7 178:22 180:2 182:21 213:21</p> <p><b>consenting</b> 241:14 241:17</p> <p><b>consequences</b> 181:17 200:1 295:18</p> <p><b>conservative</b> 65:25 205:2 236:16</p> <p><b>consider</b> 126:2,14 277:8 278:14 294:19</p> <p><b>considerable</b> 284:16</p> <p><b>considered</b> 121:8 191:8</p> <p><b>considering</b> 189:10 190:9 192:7</p>	<p><b>considers</b> 295:6</p> <p><b>consistent</b> 30:17 139:10 146:4 178:21 186:7 273:3</p> <p><b>consisting</b> 152:20</p> <p><b>consolidated</b> 152:15 194:22</p> <p><b>consolidation</b> 151:18,19 154:8 154:15,17 204:11 235:25 236:1 291:18 293:11,17 293:23 294:1</p> <p><b>constellation</b> 15:21</p> <p><b>constituents</b> 190:18</p> <p><b>constitute</b> 139:22</p> <p><b>constitution</b> 10:11</p> <p><b>construct</b> 37:19 37:19 42:7 94:22 144:10 180:18,19 192:11,14,16,17 197:25 198:12 202:21 220:4 243:11 280:23</p> <p><b>construction</b> 47:5</p> <p><b>consume</b> 140:13</p> <p><b>consuming</b> 84:6 94:6,9,18,21 96:8 96:15 99:15,22</p> <p><b>consummate</b> 142:22</p> <p><b>cont'd</b> 298:1</p> <p><b>contact</b> 25:3,15 25:21,22 26:8 215:3</p> <p><b>contacted</b> 42:20 189:3,13</p> <p><b>contemplated</b> 26:24 176:15</p>	<p><b>contemplates</b> 92:18 229:4</p> <p><b>contemplating</b> 175:21 219:1</p> <p><b>contemplation</b> 52:23</p> <p><b>contentious</b> 204:3 285:13</p> <p><b>context</b> 181:6,7 182:13</p> <p><b>contingencies</b> 185:15</p> <p><b>continue</b> 20:24 46:20 98:10 140:13 206:14 222:8 284:22</p> <p><b>continued</b> 98:21 192:25</p> <p><b>continuing</b> 29:25</p> <p><b>contract</b> 47:13 276:17</p> <p><b>contractual</b> 159:14</p> <p><b>contrary</b> 190:19 227:2 243:19</p> <p><b>contributing</b> 29:5</p> <p><b>control</b> 241:9</p> <p><b>conversations</b> 58:23 80:3 206:7</p> <p><b>conversely</b> 21:25 140:9</p> <p><b>conversion</b> 140:10 187:20 191:1 194:10,13 194:15,25 217:4 231:19,21 240:14 243:2 245:1</p> <p><b>convert</b> 195:17 225:22</p> <p><b>converted</b> 196:5 205:22 232:6</p> <p><b>converts</b> 221:8</p>	<p><b>convince</b> 38:1,2 40:6</p> <p><b>cooler</b> 114:11,13</p> <p><b>coop</b> 3:7 6:21 15:20</p> <p><b>cooperation</b> 23:24</p> <p><b>coordinating</b> 116:22 123:3,5</p> <p><b>copy</b> 50:12 76:12 76:23 133:3 214:7 214:13</p> <p><b>core</b> 28:17</p> <p><b>corp</b> 3:21 294:5</p> <p><b>corporation</b> 1:10 2:1,6 4:25 5:14 6:19 7:1,3 10:17 11:2 20:3,8 48:25 57:16 137:16 207:5 293:6 294:2</p> <p><b>corporation's</b> 3:12</p> <p><b>correct</b> 30:24 31:2 32:10 35:16 45:19 46:7 48:2 54:21 57:11 60:20 62:22 67:13 69:18 70:19 75:5,7,16 87:8,15 87:16 88:1,7,23 95:23,24 96:2,3,6 96:7,10,25 97:1 97:15 98:16 99:10 100:12,14,20 101:3,6,7,9,12,15 102:2,6 104:2,21 105:17,24,25 106:9,14,15,17 108:21,25 109:5 110:19,22,25 111:1,3,22 112:6 115:7 118:3,6 120:1,4,24,25 121:5,9,12,13,20 121:21,23,24</p>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------



[correct - court]

Page 17

122:18 127:12,16	<b>counted</b> 166:4,5	31:3,18,21 32:14	101:21,23 103:18
129:21,25 130:18	259:25 260:1,2,4	33:2,6,16 34:8,21	104:3,12,14,18,22
130:20,21 131:13	260:6 265:7,9,11	35:4,6 36:14,16	105:10,14,18,20
131:18,20,21	<b>counting</b> 46:15	36:19,23 37:1,14	105:22 106:4,7,20
133:23 134:18,24	164:15 166:1	37:25 38:7,11,14	107:20 109:7,9,17
136:15,16 143:5,7	170:22 257:21	38:16,24 39:5,10	109:21,25 110:3,9
143:9,12 148:18	258:17 266:13,14	39:14,17,23 40:10	110:12 112:18,22
149:21,23 153:9	267:15 268:24	40:12,14,17,20,22	113:2,10 114:25
153:10,24 154:20	270:1,14 285:3	41:3,11,20,23	115:3 116:2,10
157:5 167:9 169:1	<b>countless</b> 259:11	42:1,11,15,23	117:5 118:1,5,22
169:23 170:12	259:24 260:9,12	43:9,20 44:7,18	118:25 119:3,7
179:19,21 183:17	260:17	44:21 45:5,12,17	121:25 124:11,15
217:4 218:10	<b>country</b> 299:22	45:20,23 46:3,8	124:18,22 125:2,5
230:20 237:21	<b>counts</b> 291:16	46:11,13,19,22	125:14,17,25
238:2 244:10	<b>couple</b> 29:12 77:6	47:16,19,24 48:3	126:6 127:8 132:5
250:11,11 251:22	81:7 85:20 86:17	48:6,8,13,15,19	132:22,24 133:3,8
265:1 282:12,21	99:1 117:17 125:9	48:23 49:5,8,11	133:13 134:1,5,6
<b>correspondingly</b>	145:7 186:20	49:13,15,17,20,25	134:8,11 135:23
136:14	189:15 190:16	50:6,16,21 51:3,5	136:1,18,22 137:2
<b>cost</b> 175:25	202:17,18 203:19	51:8,10,19,23,25	137:14,25 138:13
232:16,18,19	204:14 206:6	52:14,18,19,22	140:16 141:6,10
<b>costs</b> 200:16 201:6	266:21 270:18	53:1,4,7,9,17,24	141:13,16,19,24
<b>could've</b> 229:7	292:5	54:2,8,15,18,22	142:4,8,11,20
256:15	<b>coupled</b> 139:24	55:8,12,14 56:4,6	143:3,6,8,10,13
<b>counsel</b> 10:18	154:22 159:17	56:9,12,14,20,25	143:18,22 144:2,5
35:18 42:17 58:22	<b>course</b> 28:16	57:3 59:12,18,23	144:20,22,24
89:9,17 116:1,22	39:24 40:13,16	60:2,11,14,17,19	145:2,4,14,23,25
116:23,24,24	41:9 53:16 59:5	60:21 61:3,7,15	146:4,8,16,19,22
117:1 122:13,14	71:21 81:15	61:19,22,23,25	147:3,14,19,24
122:15,16 123:15	137:21 138:20	63:16,20 67:17	148:1,5,9,11,13
123:19,22,24	148:10,24 160:10	71:13,15 76:9,14	148:15,23 149:6
125:23 126:10	177:8,13 179:7	76:17,20,22 79:3	149:10,15,20,22
150:22,23 176:13	209:9 210:20	79:19,23 80:10,16	149:24 150:3,7,9
195:20 196:16,16	219:21 222:1,3	80:19,22 81:6,10	150:13,17,18,19
203:18 206:7	238:12 282:6,24	81:25 82:8,12,20	151:3 153:7,11,13
208:13 213:20,23	<b>court</b> 1:2,16 8:15	82:24 83:3,18,23	153:15,17,19,23
214:1 223:2	20:2,9,15 21:6	85:2,6,8,11,14	154:5,9,12,14,25
235:11 277:8	23:14,16,25 24:3	86:21 88:17,19	156:20,25 157:6
<b>counsels</b> 123:10	24:6,12,20,23	89:4,7,11,16,20	157:11,13,16,18
<b>count</b> 105:15	25:11,14,17,20,24	89:23 90:5,8,10	157:21,23,25
164:6 264:17	26:5,9,19 27:12	90:16,23 93:7	158:3,5,8,14
269:25	27:14 28:5,8	96:13,16,20 99:3	159:17,23 160:14
	29:11 30:19,25	101:2,5,8,11,19	160:17,21 161:9

161:13,15,18,24	214:24 215:5,9,13	254:9,12,14,16,19	293:3,8,10,14
162:8,10,14,16,18	215:18,25 216:3,8	254:25 255:10,15	294:8,11 295:15
162:22 163:5,11	216:10,14,16,21	255:17,19,23,25	295:22 297:17
163:14,21,24	216:23,24 217:2	256:3,8,16,19,23	<b>court's</b> 54:4
164:10,24 165:2,5	217:10,16,24	257:1,7,9 258:4	208:17 214:3
165:7,11,13,18,23	218:2,4,14,16,19	258:11,16,20	280:13
166:1,4,12,21,24	218:22,25 219:7	259:3,9,15,20,22	<b>courtney</b> 12:7
167:2,8,11,13,15	219:13,16,18,22	260:5,8,11,15	276:25
167:18 168:7,9,11	220:20,22 221:2	261:1,7,12,16,19	<b>courtroom</b> 20:18
168:16,19 169:2,7	221:17,20,22	261:24 262:2,6,8	44:19 45:6 56:5
169:10,18 170:3,5	222:20 223:1,7,9	262:10,12,19,23	60:12 188:24
170:8,13,17,24	224:7,14,22,25	263:1,4,9,12,15	<b>courts</b> 146:11,13
171:2,10,12,15,19	225:11,14 226:5,8	263:19,22,25	222:7 227:23
171:21,23,25	226:16,18,24	264:5,16,22,25	239:15 248:11
172:3,5,19 173:3	227:2,9,10,12,15	265:2,7,9,11,17	<b>covenants</b> 47:2
174:1,3,5,11,15	227:18,24 228:5	265:22 266:1,7,11	<b>cover</b> 22:20
174:18,21,23	228:11,19,23	266:18,23 267:1,4	122:10
175:1,3,6 176:2,6	229:3,13,24 230:1	267:6,13,17,20,23	<b>coverage</b> 200:6
176:9,17,20,23	230:8,11,15,18,21	268:2,5,8,15,17	<b>covered</b> 21:13
177:1,12,14,18,21	230:24 231:3,10	268:20,22,25	22:19 75:18 105:7
177:23 178:9,14	231:12,15 232:1	269:2,8,13,16,19	125:10
178:22,24 179:1,4	232:12 233:4,13	269:23 270:3,8	<b>covering</b> 277:23
179:8,13,17,20	233:15,18,24	271:1,10,15,17,19	<b>craig</b> 55:5,16
180:3,13,17,21,23	234:3,8,13,16	271:22 272:5,7,11	298:5
180:25 181:2,5,21	235:7,11,22	272:17,19 273:7	<b>cram</b> 293:15
182:4,10,14,16,20	236:13,25 237:4	273:12,24 274:3,6	<b>crazy</b> 223:19
182:24 183:2,8,11	237:12,18,22	274:10,14,25	<b>creating</b> 97:20
183:15,17,20,23	238:1,3,5,14	275:3,6,9,23	<b>creations</b> 2:25
184:2,9,12,14,17	239:6,8,11,14	276:6,21,24	3:13 5:20 18:2
184:19,23,25	240:13,18 241:6	277:14,16 278:19	<b>credibility</b> 259:23
185:4,12,17 186:2	241:12,14,17,21	278:25 279:3,11	<b>credible</b> 138:14
186:5,11,23 187:2	242:1,9,15,18	279:16 280:6,25	246:14
189:4,8 191:11	243:5,7,22,25	281:12,15,22	<b>credit</b> 41:14
201:8,8,20 203:7	244:3,6,11,14,18	282:9,13,15,19,22	266:15 287:23
203:9,14 206:25	244:22 245:2,9,15	283:6 284:2,7,12	288:3
208:5,7,11 209:12	245:19,24 246:7,9	284:18 285:2,5,9	<b>creditor</b> 12:2,10
209:18,22 210:7	246:16,21 247:12	285:24 286:14,25	13:18 14:2 15:19
210:11,13,16,21	247:20,24 248:2,4	287:5,8,24 288:5	16:19 18:2 19:2
210:23 211:6,8,12	248:7,9 250:7,9	288:8,20 289:3,7	37:4 119:17
211:17,19,25	250:12,15,19,24	289:19 290:3,11	152:14 153:8,10
212:14,21 213:3,5	251:5,9,15,18	290:14,17,20,23	156:6 157:3
213:8,16,17 214:7	252:10,19,21,25	291:4,7,10 292:10	161:21 188:2
214:11,13,18,22	253:1,20,24 254:1	292:12,20,22,25	193:13 207:7

[creditor - de]

Page 19

208:2 234:22 237:13 241:14,17 273:17,19 280:16 280:17 <b>creditor's</b> 229:11 233:7 <b>creditors</b> 9:3 13:10 20:22 21:1 22:4 23:11 26:3 28:15 31:10,13,14 31:16,25,25 32:3 32:11,19,24 33:1 34:6,8 35:8,20 36:11 37:11,12,24 38:13 39:16 44:5 57:9 84:12 96:5 96:14 119:24 121:1 139:6 140:22 151:14 152:7 154:24 155:12,16,21 161:8 173:7 185:9 187:6 188:10,16 188:22,23 189:20 190:14,16,23 191:17 192:2,6,21 193:16,17 194:10 194:17,18 195:13 196:12,22,24 197:5,17,20 198:13,25 199:17 200:1 201:10 202:9,12,15,20 203:3,16 204:14 204:17,20 205:3,8 205:18,21 206:3 209:4 220:19 221:6 222:1,13,21 222:24 224:5 225:3 228:2,9 230:11 231:20,25 232:8,10,15 233:9 234:15 235:5	236:5,11 237:9,16 238:11 240:17,23 240:24,25 241:1,2 241:5,7,9 242:5 249:14 272:23,23 277:2,15 278:11 279:5,8,10,25 280:1,2,4,13,19 281:6 283:2,3,15 290:6 292:4,8 293:19,24,25 294:9 295:2,6,8 295:11 <b>creditors'</b> 81:17 <b>credits</b> 127:6 <b>crescent</b> 8:15 <b>cross</b> 55:8 57:1,5 61:7,12 62:3 79:4 85:8 90:17,21 91:3 93:7,9 105:1 135:24 <b>crowded</b> 44:18 <b>crushed</b> 292:4 <b>cumbersome</b> 99:14,22 <b>cure</b> 49:2,18 52:5 52:6,7,18,20 53:6 54:16 <b>curious</b> 71:7 <b>current</b> 47:13 64:22 92:11 93:4 100:13,21 129:15 129:18,22 130:1,1 130:2,10 195:18 196:17 277:21 <b>currently</b> 78:17 92:9 99:10 100:11 102:21 129:7 141:13 169:16 <b>customer</b> 121:2 <b>cut</b> 201:15 230:1 270:6	<b>cutting</b> 270:17 277:24 281:2 <b>cyrus</b> 4:19 16:10 <b>d</b> <b>d</b> 1:24 10:22 12:16 20:1 157:18 271:25 272:18 297:1 298:1 299:12 <b>d&amp;o</b> 73:1 74:21 80:6 287:3 <b>dallas</b> 8:17 <b>dash</b> 136:14 <b>data</b> 97:19 98:4 99:21 100:4,5,9 100:10,13,15,16 100:17,20 <b>date</b> 21:9,10,17 22:12 26:6 38:3,6 38:17,18 39:15,18 39:22 41:16,19 44:2 79:8,9 87:9 92:12 93:3,4 95:14,15 97:24 101:3,5,8,10,11 101:15,16,20 102:4,9 103:23 104:6,14 105:23 106:2 107:15 108:5,6,7,15,16 108:19 118:21 121:19,22 127:7 128:17,17 133:25 139:13 140:19 141:20 142:9 145:21 146:2 147:9,20,21 148:22 155:15 156:7,15 159:10 160:5,8 161:24 163:2,4,6,12 170:23 173:24 177:10,11 181:14	188:17 197:17 198:22 199:8,19 204:22,23 212:12 213:23 218:1,5 222:22 223:11 232:23 246:25 247:5,5,13,22 249:22 257:7,7 259:20 262:17,21 263:21 270:6 278:12 279:15 282:6 299:19 <b>dated</b> 56:15,23 60:23,24 61:4 90:12 133:24 298:9,12,15 <b>dates</b> 108:4,23 118:17 193:3 267:3 <b>david</b> 13:15 35:7 57:7 62:5 93:11 <b>davidoff</b> 13:9 35:7 57:8 62:5 93:11 <b>davis</b> 140:23 <b>day</b> 27:24 30:1 83:15 128:1,11 138:15,16 149:20 159:5 177:4 192:10 194:4 202:22 211:3 221:19,22 280:1 285:25 <b>days</b> 28:24 29:1 29:12,19 112:9 121:5 143:1 145:7 173:21,24 174:12 174:25 189:15 199:1 209:12 219:11 220:12 290:4,5,7 <b>dc</b> 10:13,20 <b>de</b> 12:13 14:3 65:19,22
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<b>dead</b> 251:2	170:17 194:22	105:11 107:13,13	213:15 224:1
<b>deadline</b> 257:8	195:7 209:15	108:3,4,13,16,24	<b>decide</b> 28:23 29:1
<b>deal</b> 25:8 26:15	214:1 216:15,16	109:14 116:24	38:21 74:13
27:21 28:17 29:18	224:13 225:5	117:1 118:20	169:19 217:21,22
34:12,14,16 51:6	229:21 232:13	121:1,5,7 122:13	<b>decided</b> 45:2
64:16 89:4 160:10	241:10 246:6,13	122:15 123:3,8,14	118:20 155:8
160:25 173:6,7	265:23 272:4,22	123:18,22 125:13	169:18,20 188:3
178:7 190:16	273:1,9,15 274:13	127:3,6 128:1,20	242:9
201:15 229:4	278:8,12,16,23	128:24 129:23	<b>deciding</b> 123:11
233:8 236:24	280:8 281:10	131:23 136:3,20	<b>decision</b> 33:11,12
237:1 239:15	283:22 292:9	137:18 138:21	181:23 182:15
249:17 257:19	294:14 298:18	151:19 152:7	201:9
263:9,15 278:2	<b>debtor's</b> 137:4	155:21 156:16	<b>decisions</b> 181:17
279:7 280:16	139:11 140:20	160:25 162:1	198:5,6
281:2 288:8,9,13	213:19,23 214:1	165:15,18 166:9	<b>deck</b> 138:24
<b>dealing</b> 118:9	223:2 234:10	170:1,21 173:1	140:21
138:15 154:18	249:15 270:21	187:15 193:2,18	<b>declaration</b> 4:2
173:8 185:23	273:23 274:1	193:21 194:1,2,8	20:21 55:5,7,14
192:3 220:22	276:18 277:8	194:19,19,23	55:16 56:2,15,23
230:5 249:2	292:3 297:18	195:10,13,21	60:10,24 62:13
252:17 263:12	<b>debtors</b> 1:12 2:6	196:11,15 198:9	63:1 64:4,6 66:13
266:11 288:20	7:5 8:3,3,14,14	198:24 199:4,5,16	67:20 69:17 73:12
290:6	20:8,13,20,22,25	199:24 200:7	73:21 74:1 75:19
<b>deals</b> 29:24	21:11 22:4,8 23:3	204:4,6,22 206:19	75:20,24 76:1
<b>dealt</b> 242:11	23:11,13,24 24:8	207:9,12,19,20	77:3 79:5,23 81:8
248:17 278:3	27:3,16,17 30:6	208:21 209:3,14	82:25 83:15,21,22
<b>debating</b> 284:9	30:19 31:9 32:5	210:1,2 211:3,24	83:25 84:19 86:13
<b>debt</b> 116:12 187:6	32:15 35:18 37:14	212:1,12 215:1	86:16,20,25 88:2
<b>debtor</b> 31:22 39:1	38:1 44:9,15	216:17 218:6	88:9 90:4,11 91:6
39:13,19,25 40:9	47:21 50:19 51:1	235:14 270:9,15	94:4 97:17 99:8
42:18 57:13 66:17	54:10,22,24 55:23	272:1 274:15,19	100:24 103:20
66:18,24,25 67:5	57:17 59:24 60:5	275:1,5 276:7,12	114:21 121:18
67:6,7,11,12 69:8	60:7 62:16,21	277:12 279:7	124:14 126:20
69:12,24 70:14	70:21 73:12 74:2	281:2 282:5 290:9	164:20 165:5,11
71:3,9 73:17	74:5 77:24 78:10	292:18 293:15	171:4,6,18 201:14
78:21 98:24 99:24	79:6 81:16 82:2	294:22 295:1,10	216:4 261:13
100:10,19 101:5	84:6 85:22,25	<b>deceased</b> 21:19	277:20 291:23
101:14,19 102:8	90:3,21 91:23	22:11	298:5,8,11,14
106:13 107:14,24	92:2,3,5,7,9,21,25	<b>december</b> 37:21	<b>declarations</b>
109:3 112:16	94:6 97:14 98:24	41:7 42:9 44:4	35:13 36:16 43:8
113:16,24 114:6,7	100:7,11 101:2,8	83:10 97:9,11	60:8,22 61:4
115:8 119:20	101:11 102:25	98:20 173:23	76:10 82:4 170:22
128:15,16 152:18	103:13 104:9	180:7,16 197:11	182:8 183:3

202:14 <b>deduct</b> 103:23 166:18,20 167:5 <b>deducted</b> 131:20 229:11 <b>deduction</b> 127:19 <b>deem</b> 112:18 177:25 <b>deemed</b> 30:16 32:12 60:3 106:16 113:7,18 121:4 174:8 180:23,24 180:25 181:6 244:1,3 290:6 <b>deems</b> 114:1 <b>default</b> 253:6 <b>defendants</b> 205:6 <b>defenses</b> 71:21 194:3,3 250:22 <b>defer</b> 52:18 88:4 225:24 <b>deferred</b> 168:4 <b>defined</b> 47:25 62:17 187:4 260:22 272:2 <b>defines</b> 116:7 <b>definitely</b> 145:5 <b>definition</b> 233:19 257:5 274:24 <b>definitive</b> 142:12 <b>defrauded</b> 256:10 270:10,11 <b>degree</b> 295:7 <b>delay</b> 24:7 79:8,12 79:25 195:19 197:2 215:3,3 <b>delayed</b> 163:12 184:21 <b>deliberate</b> 101:14 160:12 <b>deliberately</b> 118:20	<b>delighted</b> 212:11 <b>delivered</b> 96:2 128:3,8 278:7 <b>deliveries</b> 255:3 277:9 <b>delivery</b> 109:22 254:22 267:3 <b>demand</b> 71:15 249:1 255:9 <b>demanded</b> 159:1 <b>demands</b> 92:2 249:4 <b>demonstrated</b> 138:25 <b>denied</b> 249:9 <b>department</b> 9:11 10:1,9 24:24 <b>depend</b> 75:1,8 <b>dependent</b> 196:9 <b>depending</b> 64:17 68:4 79:14 98:2 109:1 161:2 180:7 <b>depends</b> 72:25 75:18 117:4,25 <b>deposit</b> 227:3 <b>deposition</b> 61:12 61:13 90:20 136:25 137:5,10 <b>depositions</b> 190:4 190:5 <b>derived</b> 104:8 199:7 <b>describe</b> 58:25 94:9 97:4 126:2 <b>described</b> 22:20 84:21 <b>description</b> 297:16 298:4 <b>deserve</b> 183:24 <b>designated</b> 26:7 61:13 90:19 <b>designations</b> 90:21 136:25	137:5 <b>designed</b> 28:22 <b>designee</b> 140:21 150:3 <b>designees</b> 140:19 140:23,25 148:17 148:19 <b>despite</b> 207:18 292:1 <b>detail</b> 112:2 115:14 <b>detailed</b> 73:12,20 <b>details</b> 190:8 <b>determination</b> 208:22 <b>determine</b> 108:5 124:3 240:7 277:6 279:18,18,20 <b>determined</b> 74:8 103:13 105:1 108:18 120:20 217:18 248:25 <b>deutsch</b> 19:10 <b>development</b> 129:1 <b>dialogue</b> 173:1 <b>diamond</b> 13:17 <b>dicta</b> 275:16 <b>didn't</b> 174:9 <b>died</b> 21:16 <b>difference</b> 108:9 108:17 110:11 192:17 232:1 238:6 <b>differences</b> 204:6 <b>different</b> 31:21 41:24 82:24 108:15,23 135:9 135:11 156:21,21 157:7 158:1 175:25 194:17 220:7,8 233:5 255:4 272:19	291:15 <b>differently</b> 104:5 183:5 233:18 240:23 242:17 <b>difficult</b> 172:24 187:13,18 202:24 202:25 262:13 <b>diligence</b> 24:1,6 81:18 82:20 136:12 182:17 188:25 189:5 228:20 <b>diligent</b> 145:9 <b>diminish</b> 191:2 <b>diminished</b> 209:19,23 210:19 <b>diminution</b> 208:19 <b>dip</b> 77:16 99:25 169:25 220:23 221:2,14,15 223:3 223:9 226:24 230:13 234:17 <b>direct</b> 55:15 56:16 56:21,24 60:22 61:1,5 76:5 90:11 90:14 97:16 112:20 137:22 198:8 255:12 298:10,13,16 <b>direction</b> 137:22 <b>directly</b> 66:22 83:6 <b>director</b> 96:25 <b>disableds</b> 22:21 <b>disadvantageous</b> 193:18 <b>disagree</b> 44:23 119:24 175:7 211:3 216:3 236:25 239:3 245:17 271:1 275:12
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[disagreed - duplicate]

Page 22

<b>disagreed</b> 275:11	<b>discuss</b> 33:23 64:4	236:8,15,20 237:8	292:21 293:3,8,9
<b>disagreement</b>	115:25 126:10	<b>distributions</b>	294:14
170:19 198:2	138:12 139:4	50:25 195:16	<b>dollars</b> 50:19
<b>disagreements</b>	212:12	197:20 201:10	63:11 65:3 74:19
207:11,18	<b>discussed</b> 32:16	233:22	75:17,22 81:2
<b>disallowed</b> 115:2	58:6 59:8 66:6	<b>district</b> 1:3 3:15	98:3,6 102:10
<b>disallowing</b> 106:5	93:16 154:1	5:16 10:3 11:17	115:15 116:12
106:13 122:1	<b>discussing</b> 41:24	15:2 49:23 50:6	118:14 161:21
131:5 257:17,22	<b>discussion</b> 86:6	50:18,20 51:18	165:15 220:17
263:24	114:10 167:18	206:16 275:10	258:9,14 260:21
<b>disappointed</b>	<b>discussions</b> 58:20	<b>diverged</b> 193:10	260:23 261:5
188:20	59:2,3 71:24	<b>divine</b> 137:9	269:11
<b>disburse</b> 50:18	81:18,25 82:21	<b>dno</b> 139:23 183:6	<b>domestic</b> 35:12
<b>disbursed</b> 224:19	93:23 101:17	<b>docket</b> 49:3 60:9	95:15 131:20
<b>discharge</b> 272:10	114:2,5,9 118:1	134:6 190:22	283:8
<b>disclose</b> 141:8	123:10 125:22	198:10,17 218:8	<b>domino</b> 187:25
<b>disclosed</b> 58:1,18	152:10 169:25	<b>document</b> 36:22	<b>donna</b> 15:16
185:18 271:9	191:25,25 213:25	57:14,17 62:14	90:24 208:12
<b>disclosure</b> 122:19	244:13	63:18 84:1 94:4	<b>door</b> 280:10,13
132:9,13,16,19,25	<b>disingenuous</b>	128:2,20 133:6,10	<b>doors</b> 190:15
133:9,12,13,15	190:13	133:20,22 134:5	<b>double</b> 269:24
134:8 136:7	<b>disparate</b> 33:9	134:14 135:7	270:1
141:21 165:10	<b>dispute</b> 22:5 27:7	136:6 198:10	<b>doubt</b> 34:9
204:5,9 205:1	109:18 110:21,24	257:5	<b>downside</b> 194:16
234:20 235:2	153:4 164:2	<b>documents</b> 47:11	<b>dozen</b> 35:25
<b>disconnect</b> 277:4	166:25 235:2,7,14	47:12 103:7,8	<b>draft</b> 57:24 184:7
278:6	<b>disputed</b> 267:3	142:12,21 271:9	185:2 213:25
<b>discount</b> 35:23	<b>disputes</b> 75:15,17	<b>doesn't</b> 177:19	<b>drain</b> 1:24
39:17 179:3,5	168:25 171:9,12	<b>doing</b> 29:4 73:18	<b>dressings</b> 198:3
202:1 255:19	<b>disputing</b> 84:10	112:9 132:1 147:5	<b>drive</b> 11:3
266:18 284:17	<b>disregard</b> 253:10	147:12 156:19	<b>driving</b> 123:11
<b>discounted</b>	<b>disservice</b> 226:3	177:1 192:7 235:8	<b>drogin</b> 18:1
111:25	<b>distinction</b> 187:11	243:20 244:6	<b>drop</b> 121:8
<b>discounting</b> 269:7	<b>distribute</b> 30:9	254:1 273:3	<b>dublin</b> 9:7 147:10
<b>discovered</b> 228:19	232:5,8 236:8	281:10	203:11,12,15
228:20	<b>distributed</b> 50:15	<b>dol</b> 23:19	207:1 219:4
<b>discovery</b> 71:20	189:20 196:24	<b>dollar</b> 40:18 57:21	<b>due</b> 23:25 24:6
240:1	<b>distributing</b> 234:2	95:19 119:21	40:2 59:5 82:20
<b>discrimination</b>	<b>distribution</b> 177:7	125:13 173:3,4	97:23,23 100:10
283:10 284:6	179:11,16,20	223:4 233:11	182:17 209:13
<b>discriminatory</b>	181:10,13 200:24	241:1,2 262:5	221:23 258:23
177:25	201:4,5 209:5	280:5 287:3	<b>duplicate</b> 76:16
	233:20 234:6	292:10,11,12,20	115:20 253:16

[duplicate - entitled]

Page 23

265:4 <b>duplicates</b> 116:13 119:12 130:13 252:13 <b>duties</b> 240:21 <b>dynamics</b> 241:25 242:2 <b>déjà</b> 118:22	134:10 150:12 <b>echo</b> 202:24 <b>economic</b> 181:17 <b>eda</b> 50:3,13 52:8 66:3 <b>edgewell</b> 4:6 6:14 <b>edward</b> 17:21 61:9 90:18 291:12 <b>effect</b> 148:16 175:16 188:1 283:24 <b>effected</b> 142:22 143:20 <b>effective</b> 21:9,10 38:3,5,10,17,18 39:15,18,21 41:16 41:19 44:2 79:8,9 79:18 82:19 92:5 92:7,12 93:3 117:14,22 132:12 139:13 140:18 141:20 142:9 143:3,11 144:3,17 144:18,25 145:9 145:18,19,21 146:2 147:9,20,21 148:13,22 155:15 156:9,15 159:10 161:24 163:1,3,12 163:15 164:16,20 170:23 172:10 175:25 177:10,11 181:14 185:7 186:15 197:17 198:22 199:8 203:22 204:1,22 204:23 205:11 206:18 211:7 213:2,11,12 217:6 217:12,23 218:1,5 218:6,9 219:12 232:23 233:17,19 236:23 238:21,24	240:9 246:25 247:4,13,18,22 249:22 257:12 272:13 279:15 282:6 285:21 <b>effectively</b> 149:1 156:8 178:1 280:3 <b>efficient</b> 140:7,14 198:14 <b>efficiently</b> 197:22 <b>effort</b> 23:23 99:21 129:8 160:12 175:1,19 189:17 230:3 <b>efforts</b> 283:5 <b>eight</b> 71:11 269:3 <b>eighth</b> 17:18 120:10 265:3 <b>either</b> 33:19 118:6 126:5,9 157:13 169:2 191:3 218:2 225:15 237:19 288:12 295:8 <b>election</b> 185:18 <b>electric</b> 5:14 <b>element</b> 22:25 <b>elements</b> 87:15 199:22 <b>elephant</b> 284:24 285:25 <b>eliciting</b> 89:18 <b>eliminate</b> 86:6 <b>ellen</b> 16:25 <b>elucidated</b> 43:3 151:22 <b>emerge</b> 142:7 <b>emergence</b> 147:13 156:18 199:21 <b>emotion</b> 202:23 <b>emphasize</b> 202:10 <b>employed</b> 187:22 <b>employee</b> 126:5,9	<b>empty</b> 274:5 <b>enable</b> 43:6 <b>encouraging</b> 144:14 <b>ended</b> 146:14 <b>ender</b> 119:6 <b>enforce</b> 272:5,7 <b>enforcing</b> 273:2 <b>engage</b> 170:20 <b>engaged</b> 81:17 <b>enjoin</b> 46:5 <b>enjoined</b> 272:3 <b>enormous</b> 196:13 <b>ensure</b> 147:12 149:2 199:20 205:2 <b>ensures</b> 23:11 <b>enter</b> 23:14 141:16 194:1,7 297:17 <b>entered</b> 106:4 114:25 121:25 141:22 142:12 188:7 190:6 191:24 201:16 218:23 228:9 264:17 <b>entering</b> 209:12 <b>enterprise</b> 152:2 163:23 <b>entertainment</b> 5:2 11:10 289:15 <b>entire</b> 280:23 <b>entirely</b> 39:24 <b>entities</b> 224:16 292:9 <b>entitled</b> 37:5 39:11,14 40:17,23 41:8,13,15 59:1 166:24 200:5 212:8 235:18 237:17 279:14 281:18
<b>e</b>	<b>effect</b>	<b>empty</b>	
<b>e</b> 1:23,23 8:1,1 14:7 17:13 20:1,1 23:7 26:13 52:11 55:16 56:12 127:2 297:1,3 298:1,3,5 299:1 <b>earlier</b> 52:22 79:13 89:1 144:12 156:13 164:2 180:1 195:24 206:15 216:6 <b>early</b> 144:11 145:19 236:17 277:7 <b>easement</b> 47:5 <b>easily</b> 240:9 247:12 254:7 <b>east</b> 16:11 <b>easy</b> 25:5 29:23 155:24 184:14,15 205:4 <b>ecf</b> 2:6,10,13,15 2:17,19,21,23,25 3:2,5,8,10,13,15 3:17,19,21,25 4:4 4:6,8,11,13,15,17 4:19,23,25 5:2,5,8 5:12,14,17,20,22 5:24 6:1,3,5,8,10 6:12,14,17,19,22 6:24 7:1,6 20:16 45:10,15,25 46:24 47:8 49:3 53:20 55:6 56:2 90:4			

<b>entitlements</b> 141:1	10:15,22 11:6,14 11:21 12:7,15,16	200:20 205:5 206:7	<b>everybody</b> 30:11 34:16 145:10
<b>entries</b> 98:1	12:23 13:6,7,15	<b>estimate</b> 65:16,22	187:20 196:15
<b>entry</b> 21:17 28:25	13:23 14:7,14,15	66:4,11 71:19	197:24 205:18
29:1 30:3 173:21	14:23 15:7,16,25	81:5 91:10 111:24	273:16 283:21
198:10	16:7,15,16,25	117:2 129:15,18	290:7
<b>epa</b> 68:9	17:13,21 18:6,13	129:22,22,24	<b>everybody's</b>
<b>epi</b> 6:5,10	18:22 19:8,15,23	130:1,2,6,10	147:12 186:15
<b>equal</b> 22:13 57:23	<b>essence</b> 25:15	131:11,23,23,24	<b>everyday</b> 205:25
<b>equation</b> 79:24	46:3 217:17,18	131:25 133:22	<b>evid</b> 298:4
<b>equipped</b> 76:25	<b>essentially</b> 50:3	139:11 158:17	<b>evidence</b> 27:22
118:16	194:21 204:18	160:18 164:1	29:17 54:7 55:7
<b>equitable</b> 16:20	209:15	248:24 249:3	55:18 56:24 59:22
230:19,22	<b>establish</b> 21:11	254:4	60:6 61:6 136:20
<b>equitably</b> 23:12	262:13	<b>estimated</b> 95:20	136:23 138:2,3,21
<b>equities</b> 238:7	<b>established</b>	127:3 162:6	138:25 139:10
<b>equity</b> 222:20	251:23	167:19	151:17 159:16
272:23	<b>estate</b> 3:4 15:10	<b>estimates</b> 80:12	164:9 172:9,21
<b>eric</b> 6:17 13:11	21:16 30:10 50:4	91:13,17 123:16	181:25 186:10
16:16 35:9,11	64:14 65:3,13,17	129:6 131:7 135:9	209:22 228:19
<b>erica</b> 219:25	69:11 70:22 74:11	164:4 168:21	232:21 236:14
<b>erika</b> 14:15	77:15 88:12 91:1	<b>estimating</b> 69:20	248:22 251:17
186:24 290:24	132:6 134:2,17,23	129:8 132:2	264:9 286:14
<b>esl</b> 3:24 4:3,22 5:7	140:13 148:16	<b>estimation</b> 215:21	<b>exact</b> 69:5 70:3
5:11 6:1 13:2	155:9 168:10	<b>et</b> 1:10 2:1 6:12	<b>exactly</b> 33:22 53:2
42:21 53:14 62:17	169:9 173:14	26:16 182:24,24	72:9 219:5 279:10
62:22 72:24 73:2	179:6 186:4	257:8 272:22,22	<b>exam</b> 297:5
74:20 75:7 80:17	190:25 191:2	272:22 278:4	<b>examination</b> 57:5
81:3 87:19 138:11	193:22 195:8	<b>evaluate</b> 43:6,13	62:3 85:18 88:20
139:23,24 164:14	196:7 200:25	99:16	91:3 93:9 136:4
164:15 165:23	201:6,11 203:2	<b>evaluated</b> 97:25	<b>examine</b> 55:9 57:1
166:14 183:6	206:12 216:20	<b>evening</b> 57:13	61:7,12 79:4 85:9
195:12,19 197:3	231:25 232:10	<b>event</b> 20:10 51:5	90:17 93:8 113:3
205:5 219:11	233:8,10 234:11	169:9 229:16	168:5
249:13,24 257:20	234:20,21 235:1,3	247:13 252:21	<b>examiner</b> 168:5
284:24 285:24	235:20,24 236:10	293:3	168:11 169:11
286:21 287:22	248:20 249:23	<b>events</b> 97:9 135:5	170:2
288:3,18	257:15 281:7	<b>eventually</b> 212:16	<b>example</b> 54:12
<b>eso</b> 240:5	<b>estate's</b> 178:17	286:16	167:18 171:8
<b>especially</b> 163:19	288:14	<b>evergreen</b> 200:17	181:24 184:9
175:12	<b>estates</b> 18:16	205:14	193:15 229:7
<b>esq</b> 8:7,8,9,10,11	28:16 64:9 148:22	<b>everlast</b> 3:21	247:17 268:10
8:19,20 9:7,8,9	152:14 175:17		



[exceed - far]

Page 25

<b>exceed</b> 21:22	43:16 73:14,19	<b>explicit</b> 154:4	147:8,10,13 152:1
<b>exceeded</b> 97:25	74:2,6 79:7 81:12	<b>exposure</b> 199:19	160:12 163:11
<b>excess</b> 36:1	84:5,8 94:2,5,8	<b>expressly</b> 229:16	173:2 184:3
108:16 134:19	103:21 139:1	<b>expunged</b> 103:24	187:15 229:10
<b>exchanging</b> 52:11	142:14 153:19	115:23 265:15,19	288:2 291:22
96:21	160:18,23 161:20	<b>extended</b> 41:14	<b>factor</b> 43:24
<b>excluding</b> 115:21	161:25 162:6	145:22	184:15 232:16
<b>exclusive</b> 33:8	163:1 172:7,10	<b>extending</b> 247:22	295:5
<b>excuse</b> 87:23	175:10 185:9,21	<b>extends</b> 212:2	<b>factored</b> 246:18
127:23 166:15	187:4 188:4 194:8	<b>extensive</b> 58:20	256:6
204:25 235:23	195:22 197:12	81:20 201:24	<b>factors</b> 167:16
270:15 272:6	199:3 202:4	<b>extensively</b>	183:14 188:3
280:18	206:20 212:25	249:16	293:18
<b>excused</b> 59:17	213:15 216:19	<b>extent</b> 30:23	<b>factory</b> 17:4
<b>executed</b> 142:22	221:5 232:15	44:10 46:5,14,22	<b>facts</b> 43:2 255:1
<b>executory</b> 47:12	246:24 257:6,8	52:16 77:16 87:21	<b>factual</b> 239:25
47:13	261:17 262:14,15	94:23 119:21	249:8 256:3
<b>exhibit</b> 21:4 36:9	278:20 279:8	141:9 142:5 161:7	<b>fail</b> 180:1
61:15,17 124:9	<b>expenses</b> 40:1	176:13 200:23	<b>fails</b> 248:10
126:19 134:7	43:22 79:20 128:4	206:24 208:19	<b>failure</b> 29:9 30:16
136:7,24 165:10	143:4,25 156:23	209:19 242:10	140:11
192:15	205:24 206:1	273:9	<b>fair</b> 27:6 42:9
<b>exhibits</b> 59:21	229:10 232:18	<b>extra</b> 183:12	69:7 84:13 86:8
60:5 61:19 182:7	238:1 254:5	214:13 241:19	95:1 162:4 176:3
298:19	266:13	<b>extrapolated</b>	178:7 179:24
<b>exist</b> 88:13	<b>experience</b> 80:4	24:10	182:6 191:13
<b>existed</b> 88:6 238:3	117:15 125:21	<b>extremely</b> 99:14	198:14 199:20
<b>expect</b> 64:14 65:7	213:14 215:24	138:14 201:13	207:24 245:7
66:19 72:1 84:11	249:2,4,10,11	249:13 251:1	<b>fairly</b> 23:12
111:18 117:16	264:11	<b>f</b>	160:22 165:14
142:6 181:19	<b>experienced</b>	<b>f</b> 1:23 23:8 26:24	185:13 197:21
186:12 204:23	251:1	47:8 60:19,19	200:3 219:24
206:8,13,16	<b>expert</b> 170:2	142:15,20 143:11	<b>fairness</b> 225:17
<b>expectation</b> 66:16	215:22	299:1	<b>falanga</b> 19:1
<b>expected</b> 183:4	<b>expertise</b> 101:18	<b>fabulous</b> 220:2	<b>fall</b> 125:8 151:12
261:20	<b>explain</b> 38:23,25	<b>face</b> 212:9 234:8	<b>fallen</b> 162:23
<b>expecting</b> 66:14	68:7 77:12 84:20	236:16 238:9	<b>familiar</b> 62:8
<b>expedite</b> 199:20	95:11 99:15 107:6	<b>faced</b> 100:19	92:14 125:23
<b>expeditiously</b>	119:10 120:17	284:15	126:8 127:25
29:13 147:13	129:5 161:19	<b>facetious</b> 279:6	128:22
<b>expending</b> 241:18	241:25	<b>fact</b> 26:25 30:15	<b>far</b> 24:3,19 32:4,7
<b>expense</b> 21:20	<b>explanation</b> 181:6	37:16 40:2 43:21	73:18 89:20
31:24 32:2,19		52:7 102:8 145:6	101:17 106:9

[far - first]

Page 26

112:7 114:4	282:1	120:24 121:19,22	<b>financial</b> 73:13,17
116:12 132:1	<b>ferraiuoli</b> 14:1	124:25 127:3	112:15 113:17,25
135:1,8 181:11	<b>fiduciaries</b> 241:23	128:1 130:11,16	114:6,19
194:14 209:25	281:8	131:1,4,12,14,22	<b>financially</b> 112:10
211:22 212:15,16	<b>fiduciary</b> 240:21	132:9 134:5 135:7	222:6,16
213:13 217:9	<b>fifteen</b> 70:8	141:25 144:9	<b>financials</b> 134:22
220:13 237:14	<b>fifth</b> 8:4 12:19	145:13 158:22	<b>financing</b> 205:7
241:22 247:3	120:9 267:7 269:4	160:24 161:5	<b>find</b> 24:17 28:18
248:20,21 250:15	<b>fifty</b> 287:3	171:18 190:21,21	29:23 103:4
252:11,12 253:1	<b>fighting</b> 188:2	192:15 206:1,9	138:13 189:18
262:2 273:7 276:9	<b>figure</b> 80:11	208:22,23 213:3	195:5 239:16
279:21 295:11	<b>figurehead</b> 200:8	213:14 216:15	<b>fine</b> 60:2 61:25
296:9	<b>figures</b> 259:1	222:9,22 229:21	83:23 168:19
<b>fashion</b> 17:6	<b>file</b> 22:22 27:23	230:10 235:2	170:5 218:16
140:7	77:17,19 78:3	239:23 256:9,12	226:12 242:15,24
<b>fast</b> 117:25	101:17 115:11	257:5 258:14	244:22 245:21
<b>fatal</b> 37:7 49:21	117:16 118:21	259:7,11,16,17,25	262:19 263:25
<b>favor</b> 27:4 152:24	122:12 141:7,7	260:1,9,13,18,23	271:5 290:13
201:5 217:19	160:5 161:10,25	260:24 261:2,4,6	<b>fingers</b> 188:1
<b>favorable</b> 242:21	162:25 180:10,12	261:21 262:2	<b>finish</b> 40:11
<b>feasibility</b> 157:1	197:10 256:10	263:21 265:22	246:10
186:6,8 213:3	257:8 278:12,19	267:15,25 270:10	<b>fire</b> 125:12
214:21 216:13	279:1 280:9	270:12,16 271:23	<b>firm</b> 17:2 94:21
239:8 247:2 248:5	<b>filed</b> 2:12 20:20	277:1 278:15	98:23 175:21,25
248:9,10	21:19,22 22:1,5	<b>files</b> 22:11	189:22 286:18
<b>feasible</b> 46:14	29:11 30:2 31:20	<b>filing</b> 27:25 57:14	<b>firms</b> 70:1 71:25
139:3 205:2	35:13 36:9 39:2	97:5,14,24 101:3	80:4 86:12 122:22
239:16,19 249:21	49:3,9 51:22 56:2	106:17 116:23	122:25 123:6
<b>february</b> 102:22	57:14 71:16,20	123:4,9,15 190:8	136:12 145:11
160:6	75:23 76:3,18	190:10 222:22	164:6 251:1
<b>federal</b> 9:13	77:23 78:8 84:1	291:14	<b>first</b> 32:22 35:19
<b>fee</b> 63:12 230:10	89:13,24 92:16	<b>filings</b> 20:4 235:3	36:10,18,21 37:2
<b>feel</b> 29:22 170:25	95:10 102:2,6,11	<b>fill</b> 80:1	37:3 45:14 55:4,4
<b>feeling</b> 192:18	102:14,15,18,24	<b>filled</b> 59:5	55:25 62:7,15
<b>feels</b> 119:1	103:12,22,23	<b>final</b> 64:20,24	64:12,12 73:10
<b>fees</b> 123:16,21	104:6,10,14,15,18	106:6 115:1 117:3	74:15 81:20 93:12
197:23 201:7	104:25 105:9,14	190:11,12 219:21	103:22 116:18
202:7 286:4	105:23 106:2,6,12	221:13 226:19	120:9 126:24
<b>feld</b> 9:1	106:14,19 114:22	<b>finality</b> 207:23,25	128:1 129:14
<b>fell</b> 220:6	115:6,9,13,23,23	<b>finalized</b> 50:11	141:21 152:20
<b>fellow</b> 149:18	116:18 117:7,10	<b>finalizing</b> 71:10	159:3,3,5 161:4
<b>felt</b> 160:3 196:25	118:18 119:12,17	<b>finally</b> 22:18	161:22 167:25
230:5 270:11	119:18 120:1,2,11	154:18	168:16 172:8

178:14 179:9,17 180:5,8 181:10,11 182:4 191:4 194:8 194:15 198:16 205:16 211:13 212:2 217:10,11 219:24 221:19,22 225:20 242:4 251:8 255:21 263:8,9,16 266:9 266:11 275:17 <b>fit</b> 280:11 <b>five</b> 50:3 68:22 72:12,14 74:9 75:2 79:15 84:2 99:4 129:10 140:19 213:24 265:14 266:3 <b>fix</b> 170:8 257:10 <b>fixed</b> 79:20,21 257:7,9 <b>flat</b> 154:17 <b>flaw</b> 37:7,9 <b>flesh</b> 79:11 <b>flipped</b> 292:23 <b>flipping</b> 217:18 <b>floor</b> 12:12,20 13:20 14:4,20 15:13 16:4,12 17:10 18:19 19:5 <b>flush</b> 196:8 <b>fochier</b> 17:5 <b>focus</b> 34:1,23 39:1 51:10 82:6 116:4 123:18 141:11 156:1 180:16 215:5,13 225:23 226:20 261:24 275:19 290:18 <b>focused</b> 27:8 72:6 290:15 <b>focusing</b> 89:16 147:15 223:9	234:16 272:19 277:18 279:16 <b>foley</b> 14:9 94:21 186:25 192:1 219:25 223:24 <b>folks</b> 149:25 <b>follow</b> 45:13 160:14 174:12 281:16 <b>following</b> 65:1 112:14 127:4,5 143:14 214:3 281:19 <b>follows</b> 21:8 <b>footnote</b> 57:24,24 59:6 63:14,16,17 63:19 99:9,13 <b>forced</b> 194:5 <b>forces</b> 189:18 <b>forego</b> 94:6 154:3 <b>foregoing</b> 299:4 <b>foreign</b> 35:10 36:3 84:23 95:3,17 96:9 108:7,19 109:4,13 243:15 262:21 267:5 283:3,11,13,25 286:9 290:6 <b>forget</b> 187:20 <b>forgiveness</b> 221:12 <b>forgo</b> 84:6 <b>forgot</b> 83:14 151:4 <b>form</b> 23:14 26:2 142:12,13 157:17 173:25 185:18 248:20 <b>formally</b> 59:21 <b>former</b> 104:11 287:2 <b>forms</b> 248:20	<b>forth</b> 20:23 48:21 86:12 87:1 158:19 168:23 170:2 189:2 194:8 205:1 206:2 234:10 250:22 285:12 <b>fortuity</b> 142:25 <b>fortunately</b> 221:4 <b>forty</b> 262:4 <b>forward</b> 28:1,3,16 94:24 156:17 200:17 205:4 206:2 217:19 278:10 288:18 <b>fought</b> 241:8 <b>found</b> 97:18 98:1 103:9 257:1 <b>foundation</b> 76:6 85:1 <b>fountain</b> 275:13 <b>fountainview</b> 275:13 <b>four</b> 63:10 67:15 75:2 99:18,23 247:22 262:4 <b>fourth</b> 120:9 <b>fox</b> 5:2 11:9 14:17 17:21 61:9,9,16 61:24 90:18,18 261:9 289:14 291:12,12 292:11 292:14,21,23 293:2,5,9,13,15 294:10,13 <b>foxes</b> 236:18 <b>framework</b> 207:22,24 <b>frankel</b> 2:12 <b>frankly</b> 28:14,18 53:14 140:5 144:11,16 147:1 149:16 151:17 185:23 191:4	197:9 281:7,10 282:2 289:20 296:4 <b>frantically</b> 153:20 <b>fraud</b> 227:9,10 228:21 229:20 <b>free</b> 158:3 197:4 200:20 <b>friedmann</b> 8:11 50:8,8,17,22 51:4 51:6,9,16 52:11 168:2,8,10,13,18 169:1,5,8,11 <b>front</b> 75:25 138:15 153:22 186:11 189:23 196:23 215:5 <b>fti</b> 202:1 <b>fu</b> 12:2 277:1 <b>full</b> 22:17 38:21 39:6 41:13,15 111:2,4 117:5 132:12 152:21 156:4 161:22 232:23,24 233:1 <b>fully</b> 51:11 117:13 142:17 249:23 251:8,9 <b>fund</b> 21:22 62:17 63:12 78:10 196:12 <b>fundable</b> 169:3 <b>fundamental</b> 185:5 <b>fundamentally</b> 28:22 29:3 34:2 <b>funded</b> 117:13,21 142:17 198:23 <b>funding</b> 77:13 224:2 <b>funds</b> 21:25 22:1 29:5 37:12 39:13 41:17 44:6 50:14
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

62:22 66:3 77:23 78:9 83:10,11 87:1 92:11 132:10 164:1,25 165:3 168:22 197:3 201:11 206:12 232:5 234:19 240:6,11,14 243:8 246:19 <b>further</b> 29:25 36:6 42:14,18 52:23 55:1 62:15 79:2 81:1,2 88:16 93:6 135:22 136:17 168:24 201:4 213:3 <b>future</b> 115:9 224:25 288:4	85:12,16,19 86:22 86:24 88:15 89:3 89:14 90:2 105:3 107:19 112:19 113:9 119:1,6 134:7,10 136:2,3 136:5,17,19 297:8 297:12 <b>general</b> 10:18 21:24 22:3,12,23 119:14,23 152:15 152:17 221:24 225:17 272:24 <b>generally</b> 92:14 205:1 248:10 249:7 264:10 <b>generate</b> 160:9 163:10 <b>gensburg</b> 15:1,7 51:17,18,20 52:1 52:24 53:2,5,8 <b>germane</b> 230:4 <b>gereson</b> 10:15 24:22,24,24 25:12 25:16,19,23,25 <b>getting</b> 30:6,6 43:14 75:4 123:10 141:10 147:3 149:5 152:5 174:6 179:9,10 182:12 189:1 191:7 196:8 215:16 223:4,16 237:11 243:21,21 272:1 274:15,18 280:2 287:23 288:3 <b>give</b> 34:7 65:3 133:14 149:4 165:25 185:8 187:16 201:10 214:7 219:11,21 224:11,13,15 225:17,23 230:11	230:12 231:4,8 241:1 242:12,13 245:10,12 248:2,2 250:6 255:8 258:1 266:15 283:18 290:20 296:2,4 <b>given</b> 27:5 29:12 29:13 31:22 34:24 36:5 66:17,24 67:6,7,11 157:3 202:2 210:25 224:10 233:24 242:2 251:12 278:22 286:17 290:5 <b>gives</b> 38:12 224:12 286:7 <b>giving</b> 132:4 161:8 184:4 210:5 231:6 245:19,25 251:11 258:25 <b>glad</b> 24:25 251:12 <b>global</b> 4:17 6:24 13:10 35:8,10 39:1 139:4 151:8 151:13 207:22 208:4 268:11 <b>global's</b> 39:3 <b>go</b> 20:4 33:23 34:22 43:2 44:4 44:16 45:9 48:8 48:17 50:19 68:3 72:12,14 75:5 79:18 81:10 82:19 83:23 85:15 86:15 87:3 94:24 103:7 103:18 109:3 113:4 115:14 117:5,13,22 119:7 122:19 124:18 130:11 132:12 142:15 143:11 144:2,17,18,25	145:9,18,19 148:1 148:13 156:9 162:5 163:15 164:16,20,24 167:22,23 168:5 170:17 172:10 174:15,16 175:3 185:4 186:14 193:23 202:7 203:22 204:1 206:18 211:7 216:4,10 217:12 217:19,23 218:6,8 228:13 233:17,19 234:22 236:17,23 237:17,24 238:1 238:23 245:1 247:4,18 249:13 250:4 257:12 259:9 261:7 273:1 273:19 278:10 288:12 292:17 296:6 <b>goal</b> 51:9 206:21 <b>goes</b> 30:1 38:10 92:5,7 143:3 213:12 217:6 272:13 <b>going</b> 25:4 26:2 26:22 27:7 28:24 29:24 30:3 31:8 34:6,17,20,22 35:14 37:15 39:13 40:6,14 43:11,20 43:23 44:2,3,5,6 44:25 45:9 48:24 49:21 50:4,5 51:14 53:1 55:20 57:10 61:11 70:21 76:4 79:16 84:25 86:15 89:4,7 92:13 93:12 94:1 94:22 95:3 106:23
<b>g</b>	<b>g</b> 11:21 20:1 60:19 142:15 297:14 <b>ga</b> 16:23 <b>gallagher</b> 7:25 299:3,15 <b>gap</b> 80:1 134:17 140:18 188:14 <b>garbe</b> 3:5 15:11 91:2 <b>garling</b> 7:25 299:4 299:17 <b>garment</b> 17:4 <b>garth</b> 10:22 <b>gateway</b> 19:3,12 <b>gears</b> 291:15 <b>geez</b> 159:12 <b>gem</b> 17:8 <b>genender</b> 8:20 55:21,22,23 56:5 58:13 59:16,19,24 60:4,7,12 61:17 61:21 67:14 72:3 76:4,12,15,18,21 77:2 83:17 84:25		

[going - guy]

Page 29

110:15 112:24 115:12 116:21 117:8 122:12,12 122:22 123:4,6,8 123:21 124:14 125:12 126:21 129:3 130:14 132:6 133:8 140:5 142:15 143:15 144:2,12,24 145:12,20 146:2 147:6 150:15 151:24 154:3 156:9 158:12 160:9 161:1,18 162:3,4,5,15,21 163:15 164:23 170:1 172:16 175:9,11,16,19 176:11,12 177:6 177:25 178:15 179:25 180:6,15 181:5,22 183:8 185:7,22,23,24 190:24 195:14 197:15,16,22,23 198:13 199:11 200:16,16,17,18 202:19 203:22 205:4,11,14 208:9 209:11 212:7 213:2,10 215:4,6 219:12 221:7,8 223:23,25 224:15 227:12 228:10 229:22 230:1 231:13 232:19 234:20 236:19,20 237:20 239:5 240:1,10,15,21,22 243:7,17 247:9 249:24 250:3,22 251:14 254:1	255:10 256:16 258:1 262:1 264:8 270:13 271:2,10 272:4 273:5,24 275:16,20 276:2 277:1,5 278:16 280:16,18 281:11 281:25 283:9,12 283:16,17,25 284:1,3 285:16,21 287:16,25 288:17 291:4 <b>good</b> 20:2,6,9 24:22,23 27:15 35:5,6 51:17,19 55:22 57:7 62:5 90:24 137:3,14,17 144:10 150:21 155:25 173:15 178:14,16 186:24 187:2,19 191:22 203:11,14 207:3 212:23 219:23 232:8,9 249:3 257:15 279:4,4,8 279:21 289:13 291:12 <b>goods</b> 96:1 121:3 121:4 127:13,14 127:20 128:3,7,9 128:16,20 220:11 222:13,16 225:5,7 255:7 278:4,7 <b>gotshal</b> 8:2,13 20:7 27:16 44:15 50:9 55:23 123:12 137:18 175:21 192:10 290:9 <b>gotten</b> 74:16 156:1 220:18,19 224:5 237:14,15 <b>gottlieb</b> 13:1	<b>governance</b> 155:15 <b>government</b> 142:15 <b>grain</b> 42:25 <b>grand</b> 239:3 <b>grandfathered</b> 22:21 <b>grant</b> 23:14 <b>granted</b> 140:15 141:2 264:7 <b>granting</b> 148:19 229:8 <b>grateful</b> 155:8 192:21 <b>great</b> 70:12 134:9 149:13 164:19 220:1 231:20 <b>greater</b> 43:15 189:22,23 204:15 204:25 293:25 <b>greatly</b> 204:25 <b>greene</b> 11:14 289:13,14 290:2 <b>greiner</b> 11:16 <b>griffith</b> 60:8,21 61:4,8,12 62:1,5 79:4,5 85:20 86:21,25 94:2 138:7,8 139:16 164:8 168:21 182:10,17 189:6 196:6 297:7,8,9 298:11,15 <b>griffith's</b> 165:5 171:4 <b>grounds</b> 228:6 <b>group</b> 3:7 4:13 6:21 12:10 14:10 15:20 17:7 18:17 27:5 28:17,18 34:24 35:19,21 36:1,7 37:13 40:4	48:11 81:16,22 83:7,10 128:25 130:23 145:9 149:14 150:5 172:11 173:1,5,8 176:24 177:2,15 177:15,19,20 178:10,11,15,16 179:11 180:5,8,18 181:12 182:4,20 187:1,3,5 188:19 189:16,17 199:12 241:6 291:8 <b>group's</b> 82:7 203:18 <b>groupby</b> 5:22 19:2 <b>groups</b> 35:21 36:5 128:24 172:25 192:3 242:5 266:17 <b>guarantee</b> 207:5 223:4 294:8,21 <b>guaranteed</b> 186:9 224:4 292:6,13 <b>guaranty</b> 10:17 11:2 <b>guess</b> 32:4,17,22 34:3,4 70:5,8,9 96:22 102:3 142:24 149:24 159:24 167:22 169:2 170:13 185:5 209:25 220:15 236:13 258:12 261:8 278:6 281:1 282:15 291:17 <b>guessing</b> 70:13 <b>guided</b> 282:13 <b>gump</b> 9:1 203:12 <b>guy</b> 124:4,6
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<b>guys</b> 124:8	175:23 203:5	<b>held</b> 200:24 201:5	<b>hoffman</b> 18:16
<b>h</b>	212:19	226:19 227:1	<b>hold</b> 165:17
<b>h</b> 10:15 13:15	<b>hard</b> 64:24 65:8	251:13	223:15 246:9
15:16 16:7 60:19	69:25 210:25	<b>helen</b> 17:3	287:24
90:8 142:15,15	283:5	<b>help</b> 126:22	<b>holdback</b> 232:7
298:3	<b>harder</b> 191:20	145:24 188:15	<b>holdco</b> 3:25 4:4
<b>hain</b> 187:7	<b>hardest</b> 183:20	200:15	4:23 5:8,12
<b>half</b> 35:25 63:9	<b>harris</b> 19:23	<b>hemrick</b> 19:8	<b>holder</b> 173:20
165:14 166:14,18	<b>hauer</b> 9:1	<b>heresy</b> 220:15	<b>holders</b> 187:10
169:4,21 215:10	<b>head</b> 68:16	<b>hey</b> 250:4	272:24
263:25 270:17	<b>heading</b> 67:22	<b>high</b> 64:21 129:3	<b>holding</b> 51:12
287:18	73:7 100:24	167:19 253:21	156:2 165:18
<b>halfway</b> 198:20	103:21 104:5	<b>higher</b> 111:17	293:5 294:2
<b>halperin</b> 15:9	<b>headquarters</b>	216:6 254:7	<b>holdings</b> 1:10 2:1
90:25	3:21	<b>highlight</b> 52:2,14	2:6 7:3 20:3,8
<b>hamilton</b> 13:1	<b>healed</b> 205:6	164:12 203:19	57:16 137:16
<b>hammering</b> 159:4	<b>hear</b> 45:3 137:4	204:13 206:6	294:16
<b>hand</b> 56:9 60:17	146:1 158:15	<b>highlighted</b> 164:2	<b>holdsun</b> 17:7
63:2 64:9 80:13	193:15 208:10	205:23	<b>hole</b> 228:1 229:1
80:14 87:5 90:6	244:15	<b>highly</b> 140:1	<b>holes</b> 138:17
91:24 92:3,6,8,9	<b>heard</b> 65:25 67:14	202:10 248:17	239:2
132:11 166:6,10	109:12 139:2	<b>hilltop</b> 46:10,23	<b>home</b> 5:2 11:9
169:16 187:14,17	174:11 189:11	47:1	<b>hon</b> 1:24
214:16	196:6 202:13	<b>hindsight</b> 227:22	<b>honest</b> 187:13
<b>handful</b> 189:15	206:15 209:25	<b>hire</b> 254:7	<b>honestly</b> 36:12
<b>handicap</b> 183:21	213:16 253:2	<b>hired</b> 244:8	105:20 126:20
<b>handle</b> 55:4 87:22	276:23 280:6	<b>hiring</b> 175:21	216:11
257:15	288:22	<b>historical</b> 97:19	<b>honor</b> 20:6,11,18
<b>handling</b> 73:21	<b>hearing</b> 2:5 7:5	<b>historically</b> 98:5	21:3 22:18 23:3
123:12	20:11 27:18 28:4	<b>history</b> 54:20	23:13,20 24:2,5
<b>hands</b> 43:23	30:6 32:16 34:22	140:11 227:13	24:16,22 26:1,18
<b>happen</b> 28:25	42:12,15 55:2	<b>hit</b> 85:20 164:2,22	27:11,13,15,19
30:3 172:16 221:8	56:17 58:2,19	195:24	28:1,10 29:12,15
287:16,17,19	60:23 90:12 106:8	<b>hk</b> 17:5	29:20 31:2,5,7,11
288:1	155:9 181:18,25	<b>hoc</b> 14:10 30:13	32:10 33:15 34:4
<b>happened</b> 63:10	193:2 196:19	36:5,7 81:16,22	34:19 35:3,5,13
187:19 188:8,11	197:14 204:5,9	82:6 83:7,10	35:15 36:18,21,25
243:3	211:3 217:11	114:14 149:14	38:5,25 39:7 40:8
<b>happens</b> 73:1	252:7 278:5	150:5 172:11	40:11 41:10 42:2
74:20 75:2 172:16	285:11,23	186:20,25 203:18	42:6,10,17,20
172:17 253:7	<b>heavily</b> 201:12	278:22 290:25	43:18 44:1,13,14
<b>happy</b> 20:25 28:2	<b>heilman</b> 12:15	<b>hockey</b> 248:15	44:16 45:4,8
137:23 146:1	48:7,9,10,14,16		46:10,23 47:6

48:2,7,9 49:22 50:8 51:17 52:3 52:24 54:4,7 55:3 55:19,22 56:1,5 57:2 58:13 59:15 59:16,19,20 60:7 60:13 61:2,9,11 61:13,22,24 67:14 76:4,7,8 83:2,17 84:25 85:5,12,17 86:22 88:15,16,18 89:3,22 90:2,15 90:18,24 93:6 96:19 104:17 105:3,4 107:19 109:20,24 110:8 112:19,23 116:6 132:23 133:2 134:7 135:22 136:2,19 137:17 137:19 138:1,24 142:3 143:17 146:3,25 148:18 149:13 150:21 151:7 154:2,20 155:7,11 156:9 158:11 163:4,18 163:25 165:21 166:8,16,18 168:4 169:22 170:12,16 171:3 172:7,12 173:12 174:24 184:6 186:6,24 188:18 189:2 191:15 195:24 199:11 203:4,11 203:15,23 204:4 206:22 207:3 208:6,9,13,23 209:2,13,21 210:18 211:2,15 211:23 212:11,20 212:22,23 213:1	213:19,19 214:15 215:20 219:6,8,9 219:23 220:9 224:19 227:7,22 227:23,25 228:3,8 228:25 229:2,19 231:9 233:23 235:13 237:2 238:10,22 242:24 243:13 244:17,24 244:24 245:8,14 245:17,22 246:12 247:11,16 255:6 256:21 257:11 261:14 263:3,7 264:21 265:16,21 266:9 267:22 269:6 270:23 271:5,18,20,23 272:6,9 273:21 274:2,8 275:7,22 276:22 281:3,23 282:21 283:1 285:4 287:21 288:19,24 289:4 289:13 290:24 291:12,15 <b>honor's</b> 198:8 227:16 252:7 <b>hope</b> 25:6 43:3 119:5 268:15 <b>hoped</b> 50:11 <b>hopeful</b> 164:3 202:16 211:9 <b>hoping</b> 195:13 <b>horrible</b> 195:5 <b>host</b> 97:25 <b>hour</b> 190:12 287:18 <b>hours</b> 20:25 34:7 243:12 <b>housekeeping</b> 59:19	<b>huddle</b> 158:11 <b>huge</b> 228:1 286:10 <b>huh</b> 146:15,18 149:9 156:24 165:6 178:13 182:9 183:19 273:11 <b>hundred</b> 125:13 181:21 232:5 258:9 269:11,11 287:3 <b>hundreds</b> 75:17 98:3 102:5,10 118:14 239:20 246:19 258:13 260:20,22 261:5 261:21 263:5 266:12 <b>hurt</b> 221:8 232:6 234:14 <b>hutcher</b> 13:9 35:7 57:8 62:6 93:11 <b>hwangpo</b> 8:10 <b>hypothetical</b> 236:3 <b>hypotheticals</b> 295:21 <b>i</b> <b>i.e.</b> 79:20 82:4 181:9 <b>idea</b> 29:24 50:13 58:11 70:7,12 73:3 75:10 93:21 111:19,20 112:9 112:12 122:6 168:5 223:19 252:8 268:14 296:4 <b>identified</b> 25:8 120:21 130:22 <b>identify</b> 100:6 133:6	<b>ignore</b> 161:1 171:15,23 264:7,8 273:4 <b>ignored</b> 171:7 <b>ignoring</b> 238:6 273:5 <b>il</b> 11:4 15:5 19:21 <b>illegally</b> 113:7 <b>illinois</b> 292:6 <b>imagine</b> 149:18 <b>immediately</b> 96:23 <b>immoral</b> 225:15 <b>impact</b> 31:12,14 135:16,18 150:25 171:5 <b>impacting</b> 135:6 <b>impetus</b> 180:10 <b>implement</b> 142:21 143:19 172:13 <b>implementation</b> 29:7 <b>implicated</b> 52:20 <b>import</b> 108:14,15 193:17 <b>important</b> 26:11 74:24 89:18 137:8 181:15 187:11 188:5,8,17 196:21 197:8,13 198:20 199:14 200:4,7,15 201:13 205:6 252:15 283:6 292:1 293:20 295:5 <b>imports</b> 84:16,20 84:22 95:8,11,22 107:11,18 108:1 108:10,18 109:19 110:4,7 118:3 193:15,16 198:7 242:8 252:8 284:10
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p><b>impose</b> 146:20</p> <p><b>impossible</b> 152:4</p> <p><b>improbable</b> 248:13,17</p> <p><b>improper</b> 42:5 271:8</p> <p><b>improve</b> 211:10</p> <p><b>inaccurate</b> 97:20 97:20</p> <p><b>inadvertent</b> 228:14,16</p> <p><b>inarticulate</b> 120:19</p> <p><b>incentive</b> 58:25,25 59:8 93:21 173:15</p> <p><b>incentivize</b> 222:7</p> <p><b>incentivized</b> 206:18</p> <p><b>incentivizing</b> 144:11</p> <p><b>inclined</b> 172:12</p> <p><b>include</b> 26:7 63:22 64:9 110:21 116:8 161:9,25 237:5 277:12</p> <p><b>included</b> 35:20 39:3 44:5 46:1 91:16 102:21 105:1 128:2 166:10 168:22 169:12</p> <p><b>includes</b> 23:15 41:6 110:24 115:25 201:7 274:23</p> <p><b>including</b> 43:5 73:14 116:2 155:13 178:22 192:3 198:7 207:13 221:6 232:18 234:5 248:13,17 255:2 272:22 276:12</p>	<p>278:4 295:6</p> <p><b>incomplete</b> 97:19</p> <p><b>incorporate</b> 208:3</p> <p><b>incorrect</b> 129:17</p> <p><b>increase</b> 193:21</p> <p><b>increased</b> 169:3</p> <p><b>incredible</b> 194:16</p> <p><b>incremental</b> 166:19 168:3 169:15 216:19</p> <p><b>incurred</b> 43:23</p> <p><b>incurring</b> 243:8</p> <p><b>indenture</b> 4:11 17:17 291:14 295:17,23 296:9</p> <p><b>india</b> 283:15</p> <p><b>indicate</b> 277:11</p> <p><b>indicated</b> 42:21 91:10 105:7 123:19 170:14 278:23</p> <p><b>indicates</b> 112:24</p> <p><b>indicating</b> 76:2 134:17,19</p> <p><b>indication</b> 24:18 275:20</p> <p><b>indiscernible</b> 31:15 34:3 35:9 68:12 159:21 199:23 225:6 264:12 273:22 274:10 275:15 280:17,18</p> <p><b>individual</b> 25:5 124:25</p> <p><b>induce</b> 209:9</p> <p><b>inducement</b> 199:18 239:25 255:5,13</p> <p><b>industrial</b> 17:6</p> <p><b>industries</b> 4:17 6:24 13:10 17:7 35:9</p>	<p><b>industry</b> 2:17 16:2</p> <p><b>inequitable</b> 238:17</p> <p><b>inexcusable</b> 228:15,16</p> <p><b>inform</b> 31:24</p> <p><b>information</b> 24:4 24:9,17 43:7,12 43:19 44:10 89:1 96:21 99:10 128:23 132:4,8 181:16 264:20 281:17</p> <p><b>informative</b> 32:7</p> <p><b>informed</b> 30:12 30:14 33:11,11 249:14 277:7 291:8</p> <p><b>ingersoll</b> 12:18</p> <p><b>inherent</b> 284:5</p> <p><b>inherently</b> 238:13 238:15,17</p> <p><b>initial</b> 36:4 82:6 155:5 205:9 209:4</p> <p><b>initially</b> 185:6</p> <p><b>injunction</b> 46:4 47:20 54:13 272:3 272:8,9,25 273:4 273:22 274:17,22 275:4</p> <p><b>input</b> 20:22 201:3 201:3</p> <p><b>ins</b> 178:10 181:9,9 244:1 290:15</p> <p><b>insisted</b> 249:17</p> <p><b>insolvency</b> 39:25 40:3 132:2,5 217:4 229:2,17 285:19</p> <p><b>insolvent</b> 283:23 283:24</p>	<p><b>installments</b> 57:23</p> <p><b>instance</b> 175:18 205:16 294:2,15</p> <p><b>instances</b> 292:5</p> <p><b>institutional</b> 195:21</p> <p><b>instructed</b> 213:19</p> <p><b>instructions</b> 214:3</p> <p><b>insurance</b> 2:10 25:4 45:15 125:10 200:5</p> <p><b>intend</b> 266:16,18</p> <p><b>intended</b> 56:16 90:11 191:22 193:5</p> <p><b>intense</b> 180:16</p> <p><b>intensive</b> 99:21</p> <p><b>intent</b> 52:12,13 118:11,12 291:1</p> <p><b>inter</b> 188:2 235:20 235:22,24</p> <p><b>intercompany</b> 78:14,16,21 97:19 97:23 98:1 99:16 99:19 100:4,6,22 115:17 233:25 234:4,17 235:9,17 235:18</p> <p><b>interest</b> 52:17 140:17 152:20 153:8 189:11 190:6,24 200:12 203:2,3 205:3 295:6</p> <p><b>interests</b> 153:6 193:10 194:18 286:22 287:1,6 293:19 294:11</p> <p><b>interim</b> 140:25 148:3 199:5 234:5 236:8</p>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------



<b>interlinked</b> 154:10,13	<b>involving</b> 46:8	52:20,20 53:6	<b>jared</b> 8:11 50:8
<b>intermediary</b> 51:12	<b>ireland</b> 3:4 15:10 91:1 157:19 208:13	68:5 84:16 95:7,9 95:25 96:5 110:3 119:13 124:24	<b>jay</b> 6:17 13:11 35:9,11
<b>intermediate</b> 183:18	<b>iridium</b> 293:18 295:5	125:18 126:5,14 126:15,16 155:15 156:21 167:8,20	<b>jean</b> 140:23
<b>internally</b> 71:24	<b>irving</b> 295:3	168:4 169:14 170:6 172:15 175:15 177:25	<b>jeffrey</b> 16:7 212:24
<b>international</b> 3:7 6:7,21 15:19 17:8	<b>issue</b> 29:8,10,10 29:14,16,18,19 31:11 33:9,13,18 38:7 40:2 41:24 46:19 49:2 68:20 84:17,20,22 86:7 89:19 95:8,12,22 100:15,17 106:20 109:15,19 110:4 112:5 113:14 114:11 118:3 120:13,17,17 121:10,11,14 126:3 144:8 147:15 151:20 156:19,22,25 159:5 166:16,25 168:13 169:19,20 169:24 170:9,9,20 171:17 195:9 210:24 214:25 215:4,14 217:20 219:15 221:4,13 229:4,6 230:10,18 230:19,21,22 237:1 242:8,9,10 242:12,20 248:7 250:1 256:2,3,4 257:17,19 262:23 267:3 273:15 280:10 283:9 286:16,16 288:5	193:16,18 199:18 199:23 200:3 204:3,15 207:13 215:5,10 232:20 239:24,25 249:8 250:14 253:5 262:17 266:21 285:13 288:12 291:16	<b>jeopardizes</b> 195:18
<b>interrupt</b> 74:14 148:9 177:12 274:9		<b>it'd</b> 132:12	<b>job</b> 147:12
<b>introduce</b> 136:24		<b>it'll</b> 75:1,8 116:17 227:1 240:5,7	<b>joe</b> 283:1
<b>inventory</b> 68:5,20 110:21 112:1 167:20 168:25 222:9		<b>item</b> 53:19,20 59:4,6 64:12 65:13,19 66:3,8 131:19 265:13,24 277:19	<b>johnnie</b> 191:8
<b>investments</b> 3:25 4:3,23 5:8,11 13:2		<b>items</b> 69:4 74:10 79:15 135:14 168:15 192:23 202:8 265:6	<b>johnson</b> 55:6,9,16 298:5
<b>invoice</b> 128:17 278:8		<b>iv</b> 107:3	<b>join</b> 57:12 189:18 289:20
<b>invoiced</b> 127:24 128:9,13		<b>i'm</b> 86:22 109:2	<b>joinder</b> 3:12 5:2 5:10,14,19,22 6:5 6:7,10,14,17,19 6:21,24 7:1
<b>invoices</b> 127:4,5		<b>j</b>	<b>joined</b> 97:9 289:8 289:9,16,21 290:1
<b>involve</b> 51:22 286:21		<b>j</b> 13:6 14:14	<b>joining</b> 289:12
<b>involved</b> 62:11 73:1 81:11 83:6 93:18,23 97:2,7 98:16 112:2 114:5 114:8 122:22 123:1,6 124:24 128:25 176:13 188:6,7,9,13,25 189:5 190:18,20 192:4 200:2 201:22 202:5 213:22 221:19		<b>jacqueline</b> 8:7 20:6	<b>joint</b> 2:5 57:15 59:20 60:5 136:24 207:9 298:19
<b>involvement</b> 97:13		<b>jake</b> 8:19	<b>jointly</b> 91:19 141:1 204:6,21
<b>involves</b> 160:22 197:19 209:11		<b>james</b> 3:5 15:11 19:15 23:20 91:1	<b>joseph</b> 17:13
		<b>jamie</b> 7:25 299:3 299:15	<b>juan</b> 14:5
			<b>judge</b> 1:25 36:12 37:18 53:8 83:5 114:1 144:4 185:3 220:18 221:18 224:8,20 226:4,7 228:22 229:9 230:7,9 243:6 246:5 249:25 252:2,24 255:22 258:19,23 259:6 266:17 268:19 275:17
			<b>judge's</b> 84:2 105:6 126:13 191:14

275:10 <b>judgment</b> 160:8 163:9 228:23,23 249:7 <b>july</b> 20:21 31:23 129:24 130:5 131:3 136:8 188:7 188:18 189:13 190:20,20 <b>jumping</b> 86:22 153:21 <b>juncture</b> 140:2 191:21 <b>june</b> 133:24,25 134:1,22 <b>junior</b> 209:4 <b>jurisdiction</b> 276:11 <b>justice</b> 9:11 10:1	147:7,7,19 155:22 159:4 172:13 185:22 186:3 189:11,24 210:2 220:15 <b>kmart</b> 292:6,18 293:5,24 <b>knew</b> 51:13 144:24 190:7,8 192:19 <b>knocking</b> 253:13 <b>know</b> 24:19 25:12 27:23 29:21,22 30:1 31:22 33:9 33:10,24 34:5,20 34:21,25 38:6 44:18 49:1 53:14 58:17 59:4,7 64:20 68:16 69:5 69:10 72:8,16,22 73:5 74:17 76:18 77:21 78:5,6,6,9 82:13 85:14 91:16 91:23 92:1 93:13 93:20,24,24 95:5 95:20 98:18,19,20 99:4,24 101:21,23 103:3,8 107:15,17 107:21 110:5,11 111:4 112:3,7,14 113:22 114:11 116:10,21 117:20 117:25 118:17 120:13,19 122:21 122:25 123:11 125:11,11,22 126:11 128:16,19 128:23 134:13 138:2,9,22,24 139:4,20 141:4,4 141:8 143:13 144:6,11,18 145:7 145:8,12,17,19	147:1,5,6,7,8,8,9 147:10,12 148:7 148:20 149:1 151:11,23 152:2,6 152:9,12,13,21 153:25 154:2,3,3 154:21,22 155:3,4 155:22,22 156:2 158:3,12,18,18,19 158:25 159:1,3,4 159:12,18 160:3,6 161:2 162:7,21 164:3,5,8,9,15,17 164:18,20 165:19 166:17 167:19,24 167:25 171:7 172:20 173:5,6,7 173:8,12,16,17 174:25 175:11,13 175:15,16,22,23 175:23 176:13,14 176:14,18,19 177:3,10,16,24 178:3,3,4,5,6,15 178:21 179:12,22 179:23,25,25 180:2,21 181:16 181:17 182:24 184:21 185:2,14 185:21 186:7,9,17 186:20 187:24 190:11 205:4 208:25 210:4,5 211:10,19 212:4 217:12 218:25 221:12 224:8,12 225:11 226:5,10 226:16 229:7,13 229:20 234:4 238:8 239:21,21 239:22 242:1,11 242:23 244:14 249:1 250:25	251:6,24,25 252:1 252:4,8 253:3,9 253:15 255:20 256:2 262:13,14 262:20 265:9 269:20 270:20,20 273:17 274:17 276:15 278:16 280:16,17 281:8 281:10,18,24 282:22 283:6,21 285:10,11 286:9 287:8 289:7 291:22 292:1,2 294:21 295:15 <b>knowing</b> 114:18 146:11 258:8 280:9 <b>knowledge</b> 58:8 67:10 78:18 91:14 97:13 125:17 195:21 <b>known</b> 114:18 141:9 142:5 161:8 291:17,18,19 <b>knows</b> 25:3 138:16 244:8 271:12 <b>kreller</b> 16:15 <b>krinsky</b> 18:1
<b>k</b>			<b>l</b>
<b>k</b> 9:18 10:19 107:3 195:2 207:16 231:25 232:10 233:8,10 234:11,20,21,23 234:25 235:3,6,15 235:18,21 236:2,4 236:11 237:14 <b>kadish</b> 11:21 <b>kanter</b> 15:1 <b>kathleen</b> 14:23 <b>kcd</b> 142:13 153:1 207:14 <b>keep</b> 30:12,14 137:21 180:9 197:14 208:16 214:14 222:19 <b>keeping</b> 190:24 <b>keith</b> 12:23 <b>kept</b> 20:3 196:19 <b>key</b> 152:12 153:5 <b>kind</b> 29:6 35:23 74:10 80:7,9			<b>l</b> 9:8 11:14 18:22 297:14 299:12 <b>l.p.</b> 4:19 16:10 <b>labeled</b> 58:24 <b>labor</b> 10:9 24:24 <b>labov</b> 14:14 220:1 <b>lack</b> 85:1 163:5 278:23 <b>laid</b> 65:6 70:24 75:2 79:15 182:7 232:13 296:7

<b>lamper</b> 249:24	<b>lawlor</b> 19:15	<b>length</b> 27:4	<b>lifts</b> 52:23
<b>landlord</b> 46:25	23:20,20 24:2,5,7	207:19 246:18	<b>light</b> 27:10 38:2
48:11	24:16,21 27:13	<b>lengthy</b> 181:18	42:16 154:16
<b>landlords</b> 47:25	<b>lawsuit</b> 125:10	<b>leonard</b> 10:15	<b>likelihood</b> 82:5
187:21	250:5	24:24	248:23
<b>language</b> 46:1	<b>lawsuits</b> 125:8	<b>leslie</b> 12:15 48:9	<b>limit</b> 146:23
52:13 54:10	<b>lawyer</b> 45:2	<b>lesser</b> 22:14	247:20 290:10
226:21 276:14	240:24 244:21	<b>letting</b> 217:19	<b>limitation</b> 146:17
<b>lanier</b> 9:9	<b>lawyers</b> 153:19	236:17	<b>limited</b> 2:9,17,21
<b>lapse</b> 197:16	220:2,16 240:23	<b>level</b> 22:15 97:25	3:10,24 4:3,19,22
<b>lardner</b> 14:9	243:4,7,8,16	197:19	5:7,10 17:6 47:7
94:21 186:25	287:3	<b>levane</b> 15:18	48:11 54:23 194:6
219:25	<b>lay</b> 26:11 182:6	<b>leverage</b> 43:4	210:10 212:25
<b>large</b> 68:17 72:18	<b>lays</b> 183:4	221:14	248:14 273:1
98:8 117:6,9	<b>lazere</b> 12:23	<b>lexisnexis</b> 275:14	<b>line</b> 31:12 64:12
160:22 182:1	<b>lbg</b> 46:10,23	<b>león</b> 14:3	65:13,19 66:3,8
195:14 196:8	<b>learn</b> 287:13	<b>liabilities</b> 124:3	73:10 129:14
202:1 286:20	<b>learned</b> 209:7	135:15	131:19 134:16
<b>largely</b> 138:9,18	<b>lease</b> 47:1,14	<b>liability</b> 43:10	135:20,20 151:20
139:2	<b>leave</b> 32:14	236:16	207:10 265:5,24
<b>larger</b> 35:23	203:25 210:23	<b>liable</b> 112:18	283:22 297:5,16
164:4 176:7	<b>leaves</b> 33:18	162:20	<b>lines</b> 82:2 84:3
189:21	<b>leaving</b> 125:19	<b>lianqiao</b> 3:7 6:21	94:13 97:17 100:5
<b>largest</b> 28:17	<b>led</b> 192:1	15:19 288:25	138:15 189:21
35:19 36:7 140:11	<b>left</b> 133:18 149:14	<b>liberman</b> 208:9	<b>liquidated</b> 79:20
152:14 173:1	174:22 272:15	208:12 209:20,24	218:10
190:17 207:7	280:10	210:9,12,15,18,22	<b>liquidating</b> 22:2
208:2 295:1	<b>legal</b> 27:5 33:25	211:2,7,9,15,18	25:7,17 57:11,18
<b>lasted</b> 192:10	106:20 115:25	<b>liberty</b> 2:9 13:3	57:21 58:1,4,22
<b>late</b> 26:23 146:8	121:14 123:21	45:15 137:19	62:9 70:22 93:14
197:9 267:15	124:24 157:1	<b>lieberman</b> 15:16	116:25 122:13
268:23 295:15	184:4 199:25	90:24,25 91:4	141:3 152:19
<b>lately</b> 191:8	202:7 213:12,13	93:6 208:12	154:18 223:23
<b>latest</b> 199:3	213:18 230:21	211:23 212:11,22	240:25
<b>laughs</b> 285:11	231:15 238:7	297:10	<b>liquidation</b>
<b>law</b> 16:18 17:2	239:24 242:10	<b>lien</b> 157:3,4,7,9	148:15 180:4
19:17 30:17 39:23	266:21 286:4	208:17,19,20	205:20 208:1
40:6 52:19 122:22	299:21	210:6,8,10 212:2	232:14 233:11
123:6 178:21	<b>legally</b> 111:21	212:8	234:10 235:19,20
180:2 186:7	<b>legitimate</b> 126:6,7	<b>lifeblood</b> 285:16	236:3 280:25
193:19 198:9	288:15	<b>lift</b> 158:9	296:1
247:4,22 276:1,12	<b>lender</b> 223:3	<b>lifted</b> 52:22 54:17	<b>lisa</b> 7:24 299:3,8
		54:18	

<b>list</b> 66:18,20,25 67:6,8,11 107:24 107:25 143:11 161:6 162:11	211:22 225:3 231:22 232:3 235:23,24 236:21 240:2,5,11,16 241:6 247:25 248:13,14,17,18 248:19,21 249:12 249:13 250:2,24 251:1 252:9 272:15 286:17 288:12	<b>longer</b> 23:23 52:17 74:9 79:14 187:22	<b>looks</b> 133:18 <b>loosely</b> 239:21 <b>lord</b> 11:1 207:4 <b>los</b> 15:23 16:13 <b>lose</b> 118:6 270:15 <b>lost</b> 193:21 217:20 220:14 245:22 248:18
<b>listed</b> 102:25 103:13 161:10 265:10 292:16	251:1 252:9 272:15 286:17 288:12	<b>look</b> 40:14 41:11 73:25 91:5 103:2 103:7,8,8 105:19 109:12 135:1,14 149:24 159:11 170:4 174:23 175:15 176:15 179:1 181:11 195:22 200:3 210:16 216:4 221:7 225:16 229:24 239:8 240:22 242:16,17 249:3 250:24 251:10 252:10,22 256:16 265:12 268:8 269:19 270:8 275:23 280:22 282:3	<b>lot</b> 23:16 36:3 69:4 102:1 120:23 135:13 139:2 144:13 156:1 157:25 158:1 163:10 172:25 175:23 180:7,11 187:19 188:2,8,23 189:3,5 191:7 193:15 202:22,23 204:3 206:10 207:10,10 212:10 229:18 239:22 244:12,13 251:18 251:19 255:1 262:16 264:20 265:12,13 283:10 287:13
<b>listen</b> 29:21 30:5 30:11,15 89:21 164:6 179:25 245:24 246:2	<b>little</b> 81:5 188:19 203:20 270:17 277:10 290:20	<b>lookback</b> 238:5	<b>love</b> 191:8,11 <b>low</b> 64:21 129:5 167:20 253:21 287:25
<b>listening</b> 34:17 188:22 189:9 190:15	<b>living</b> 177:4	<b>looked</b> 98:2 103:4 134:2 169:11 178:18 181:13 194:11 196:1 249:15 256:8,11 256:12 282:11	<b>lower</b> 130:12 167:21,22,23 258:11
<b>lists</b> 120:9 162:25	<b>llc</b> 2:13,15 3:25 4:4,13,23 5:2,8,12 11:10 12:1 14:1,2 16:19 45:25 46:10 46:24 55:16 150:11 275:14 298:6	<b>looking</b> 26:23 33:7 62:13 83:25 104:8,15 116:6 117:15 119:11,13 125:21 130:13 133:15 137:9 141:19 153:19 162:5 165:2 185:3 194:9 203:20 214:8,14 225:18 257:4 261:12 263:17 267:20 273:13 277:25	<b>lowest</b> 64:19,22 151:12
<b>literally</b> 50:11	<b>llc's</b> 5:24		<b>lp</b> 4:8
<b>litigate</b> 197:3 225:1 253:8	<b>llp</b> 8:2,13 9:1 11:1 11:8 12:9 13:1,9 13:17 14:9,17 15:9,18 16:9 17:15 18:8,15 19:1,10 20:7		<b>m</b>
<b>litigated</b> 26:22 112:4 117:3,7,20 118:5 119:25 121:12,13,15 239:24 249:5	<b>loan</b> 99:25		<b>m</b> 13:23 14:23 15:25 17:21 19:8 49:24 53:10 90:8 297:3
<b>litigating</b> 232:20	<b>locke</b> 11:1 207:4		<b>m3</b> 96:25 97:2,7,9 98:16,19,23
<b>litigation</b> 46:6,20 62:17,22 68:8 69:4,14 72:11,19 72:19,24 74:20 75:7 80:17,23 81:3,4 84:6,9,15 87:17,19 94:6,9 94:18,21 95:7,25 96:5,8,15 111:16 111:18 125:8 138:5 139:15,18 139:18,22,23,23 139:24 140:2,12 140:19,20 148:17 148:19,20 159:13 164:14,15 175:10 183:6 185:25 195:9,18,19 196:10 205:9	<b>locks</b> 37:11 <b>logo</b> 133:18 <b>long</b> 65:7,11 72:24 73:3 77:14 77:25 78:12 80:5 96:14 97:2 115:11 115:12,21 116:17 117:2,7,19 140:4 146:12 151:24 152:13 203:16 246:3 249:8 273:1 279:21		

131:25 132:1,4,10 132:15 133:18,20 134:1,22 135:2 <b>m3's</b> 97:4,13 98:25 131:23 133:22 135:7 285:6 <b>mad</b> 275:18 <b>madison</b> 13:19 <b>magnitude</b> 97:21 97:22 98:7,11 242:19 <b>magnitudes</b> 98:5 <b>maher</b> 19:10 <b>mail</b> 26:13 <b>mails</b> 52:11 <b>main</b> 20:10 46:19 124:13 243:16 <b>maintain</b> 98:21,21 <b>maintaining</b> 51:1 97:7 98:15,23,23 <b>major</b> 74:10 79:15 100:19 <b>majority</b> 72:21,23 116:11 119:14 <b>making</b> 23:9 34:15 37:15 47:21 127:13 145:12 147:7 149:3 181:17 210:3 255:3 256:14 265:12 288:15 <b>mall</b> 3:17 5:24 14:2 <b>manageable</b> 173:5 <b>mandated</b> 26:25 <b>manges</b> 8:2,13 20:7 55:23 <b>mansheen</b> 17:6 <b>manufacturers</b> 286:9 <b>march</b> 21:10,17	<b>marcus</b> 8:7 20:6,7 20:10,16 21:7 26:1,6,17 27:11 48:21 <b>margins</b> 286:10 <b>mario</b> 2:23 19:18 <b>mark</b> 2:12 <b>market</b> 12:11 <b>marketing</b> 5:19 14:18 <b>marketplace</b> 120:6,12,19,20,23 121:3,14 131:8 286:10 <b>mart</b> 195:2 207:17 231:25 232:10 233:8,10 234:11,20,21,23 235:1,3,6,15,18 235:21 236:2,4,11 237:14 <b>massive</b> 152:8 <b>match</b> 108:2 <b>material</b> 75:3 150:24 <b>materially</b> 82:24 <b>materials</b> 28:1 29:11 194:9 <b>math</b> 111:12 164:20 <b>matter</b> 1:8 25:5 26:20,21 27:17 52:7 59:20 78:2 143:1 181:9 220:25 243:9 274:3 <b>matthew</b> 15:7 51:17 <b>mature</b> 228:18 <b>max</b> 129:15,18 130:1,3,6 173:18 295:3	<b>maximize</b> 140:8 <b>maximizing</b> 30:7 <b>maximum</b> 58:12 <b>mccarthy</b> 13:17 <b>mcclamb</b> 12:16 <b>mcdonald's</b> 48:25 <b>mckool</b> 16:1 212:24 <b>mean</b> 22:16 25:14 33:16 34:9 38:22 46:19 49:8,17 63:16 64:24 74:14 79:11 82:17 97:22 99:15 104:5 105:20 111:10 119:17 120:2 123:5 124:23 126:6 139:18 142:18 146:19 147:19 157:25 163:11 167:17 168:18,19 177:3 177:16 180:6 181:18 182:16 183:2 184:9 201:3 201:20 212:2 213:8 216:8,11 231:4 232:2,13 243:8 245:11 250:9 252:10,12 261:8 269:19 272:11 273:15 275:9,23 276:10 277:25 280:3 281:16,23 <b>meander</b> 140:12 <b>meaning</b> 98:7 197:24 239:7 <b>meaningful</b> 286:21 <b>means</b> 38:17 126:23 143:23 144:2 193:11,11	244:25 252:16 257:7 267:12 272:25 <b>meant</b> 107:17 127:9 194:2 286:3 <b>mechanic</b> 33:25 <b>mechanical</b> 181:8 <b>mechanics</b> 66:23 140:16 148:2,3 <b>mechanism</b> 30:2,9 30:21 34:24 37:8 96:21 156:12 179:22 180:18 189:19 190:2 191:1 194:24 205:10 218:4 <b>mechanisms</b> 154:18 <b>mediate</b> 287:22 287:24 288:7 <b>mediation</b> 29:25 42:18,22 43:23 285:11,13,20 286:19,20 287:12 287:17 288:10 <b>mediator</b> 286:19 287:15 <b>meet</b> 23:7 88:13 139:7 195:11 296:4 <b>meeting</b> 36:4,5 192:9,10,19 199:1 <b>mein</b> 6:8 <b>member</b> 21:16 22:10,11 57:10,19 57:21,22,25 58:4 58:18 62:9 149:1 <b>members</b> 21:13 21:19 22:19 58:21 81:22 93:15 141:2 <b>memorandum</b> 198:9
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<b>memorialization</b> 296:6	95:16,18 104:3,4 104:8,20 105:2,7	245:10 248:23 250:4,4,5 251:20	<b>minute</b> 20:4 27:1
<b>memorialized</b> 25:13	106:2,5,11,13 107:9 108:11,17	251:25 252:2 253:18,18,21	<b>minutes</b> 118:23 164:23 189:7
<b>mentally</b> 287:14	108:21,25 109:4	254:3,4,5,7,8,9,14	217:11 266:3
<b>mention</b> 64:12	109:15,18 110:1,6	254:20,23 255:7	271:2
98:11 137:5	110:15,18 111:3,8	258:9 261:20,21	<b>miscellaneous</b> 80:22
<b>mentioned</b> 167:15	111:10,11,15,24	262:5,9,24 263:6	<b>misinformed</b> 41:12
172:23 247:16	112:8,25 114:22	264:1,2,6,19,21	<b>misreading</b> 274:12
266:10	115:1,4,12 119:9	265:2,4,4,15,18	<b>missing</b> 226:21
<b>merchandise</b> 107:14 127:7,9	119:12,25 120:5	266:3,6,14,19,24	<b>mission</b> 186:15
<b>merits</b> 82:1	121:22 122:1,10	267:8,10,10,11,16	<b>misspoke</b> 261:4
125:19 174:15,16	122:11 123:21	267:18 268:3,7,23	<b>misstated</b> 113:11
<b>message</b> 191:19	125:6,10,13 128:3	269:6,9,11 270:15	<b>misstates</b> 113:9
<b>met</b> 145:7 246:13	128:19 129:4,5,16	270:19 277:20	<b>misstating</b> 72:4
<b>mias</b> 124:19	129:16 130:2,6,7	286:4 287:3	<b>mistake</b> 228:14,16
<b>michael</b> 18:22	130:17,19 131:6	292:18,19 294:4,6	<b>mode</b> 185:22 186:4
<b>middle</b> 74:1 84:4	131:19 134:3,19	294:16,16,17	<b>modification</b> 7:5 20:13 23:6,8,9
94:14 97:18	134:24 135:2,2,15	295:2	<b>modifications</b> 150:25
177:15,15,19,20	139:12,14 152:15	<b>millions</b> 75:17	<b>modified</b> 2:5 52:15 57:15
<b>midnight</b> 36:22	152:20 156:18	98:3,5 100:4,5	<b>modify</b> 20:24
<b>mien</b> 3:19 4:15	159:10,20,21,21	102:5,10 118:14	<b>moloney</b> 13:6
5:10 6:3,12 17:3	159:23,25 160:18	239:20 258:14	<b>moment</b> 54:5 144:17 242:3
<b>miii</b> 264:11	165:14 166:11	260:20,22 261:5	261:14
<b>milbank</b> 16:9	167:19,24 168:22	261:21 263:5	<b>monetary</b> 155:5
<b>mildly</b> 207:10	169:4,21 170:15	266:12	<b>monetization</b> 79:9
<b>million</b> 21:12,23	170:20 171:7	<b>mind</b> 26:22 44:24	<b>monetized</b> 206:17
22:24 35:25 36:2	173:22 174:7	86:3 94:11 129:9	<b>money</b> 29:6 32:22 44:2,3 45:2 51:7
46:15 50:3,4,14	187:8 195:24	231:3	51:12,13 63:25
50:18,19 63:4,9	196:1,3,4,7,11,17	<b>minded</b> 155:23	69:3 88:12 93:1
63:10 64:2,10,17	196:23 198:23	<b>mindful</b> 145:5,20	114:7 144:14
64:17 65:4,14,19	205:10,11,15	<b>mineola</b> 299:24	165:19 166:21
66:1,2,7,9,14,22	206:15 209:11	<b>mingle</b> 17:6	168:3 169:3,8,16
67:7,9,25 68:19	210:20 211:14,16	<b>minimal</b> 86:5	170:22 172:1
68:22,24 69:9,13	212:10,17 216:19	194:3	195:8 200:21
69:21,23 70:6,8	220:18 222:4	<b>minimis</b> 65:19,23	
70:17,21 71:1,4	223:12,12,13,14	<b>minimize</b> 140:8	
71:23 74:24 80:11	223:19,21,22,24	<b>minimum</b> 58:11 149:20	
80:21,24,24 81:5	224:1,2,18,21,24	<b>mint</b> 18:13	
84:23 86:7 87:7	228:4 229:1,22	150:21	
87:12 91:11,21	230:23 231:7,18	<b>minus</b> 111:10	
92:10,18,24 93:1	231:22 232:2,2,3	263:20 265:24	
	232:9 237:24		

[money - negotiations]

Page 39

201:6 205:13 209:1 212:17 215:1,15,17 221:7 223:17 224:9 226:19 231:4 233:1 234:21 236:17 237:23 240:4 241:19 245:20 258:3,5 273:19 284:25 285:3 296:8 <b>monies</b> 113:18 168:8 <b>monitored</b> 99:19 <b>month</b> 65:12 99:18,23 206:9 <b>monthly</b> 57:23 <b>months</b> 28:14 43:8 70:2,4 72:7 74:8,9 79:14,25 80:5 116:19 117:17 145:19,20 146:12 160:11 189:14 213:24 <b>morabito</b> 14:15 150:8 186:24,25 187:3 191:13 201:21 203:8 220:1 283:4 284:5 290:24,24 291:5 <b>morabito's</b> 283:19 <b>morning</b> 20:2,6,9 24:22,23 27:15 35:5,6 50:12 51:17,19 55:22,25 57:7 62:5 66:6 188:19 209:7 <b>mortgagee</b> 208:14 <b>motion</b> 7:5 20:13 20:20 23:14 118:21 128:1,18 128:20 129:1 160:23 162:1	208:22 213:14 222:3 229:21 249:6 254:22 255:6 <b>motions</b> 103:2 128:1 201:1 205:25 221:19 <b>mouth</b> 296:9 <b>movant</b> 19:18 <b>move</b> 27:22 28:3 29:13 54:7,25 55:2,6 59:21 96:19 105:18 132:23,24 158:9 215:7 228:21 238:17 247:9 248:4 255:13 256:16 265:13 266:20 <b>moved</b> 210:20 285:10 <b>moving</b> 28:1,11 28:16 124:11,13 137:22 138:24 147:13 156:17 <b>mulberry</b> 19:4 <b>multiple</b> 81:17 115:20 <b>murphy</b> 20:21 73:12,21,23 75:19 75:20,24 76:1,6 76:10,25 84:19,21 85:2,4 86:19 87:25 88:25 89:7 89:21 90:3,10,17 90:20 91:5,9,23 92:14 93:8,11 96:20 103:19 109:11 124:15 136:6 138:9 155:1 160:17 176:23 177:2 182:10 201:25 210:1	277:19 291:20 297:10,11,12 <b>murphy's</b> 79:23 80:12 138:14 151:22 261:13 <b>murry</b> 17:5 <b>mutual</b> 2:10 45:15 153:1 <b>n</b> <b>n</b> 8:1 10:12 19:15 20:1 56:12 60:19 64:8 297:1,3,14 298:1 299:1 <b>n.c.</b> 5:5 <b>name</b> 57:7 93:11 <b>narrow</b> 208:24 <b>natasha</b> 8:10 <b>national</b> 4:10 17:16 291:14 <b>natural</b> 146:13 242:6 <b>nature</b> 203:24 <b>neale</b> 15:18 <b>near</b> 66:2 145:15 209:1 <b>nearest</b> 70:5 108:11 111:8 123:20 <b>nearly</b> 138:3 <b>necessarily</b> 62:24 119:20 163:7 193:14 221:12 232:7 235:14,15 254:2 <b>necessary</b> 23:10 31:8 34:5 142:21 143:19 206:24 <b>need</b> 26:14 29:13 29:19 34:23 43:12 44:23 51:22 71:15 80:1,23 81:5 82:18 88:13 96:18 115:23 118:5	126:21 133:14 142:1 157:8,8 163:7 168:9 169:19 170:25 172:9 198:15 200:21,25 201:7 211:19 217:13 241:18 244:14 247:17 251:18,19 257:2 279:20 282:7,16 285:17 285:17,20 286:6 <b>needed</b> 123:21 160:5 191:10,19 191:20 198:4 <b>needs</b> 40:4 181:6 181:7 196:15 201:11 243:9 <b>negate</b> 193:20 <b>negative</b> 200:1 <b>neglect</b> 228:15,17 <b>negotiate</b> 39:19 193:1 196:20 245:3,4 286:7 295:22 296:2 <b>negotiated</b> 149:17 201:12 202:11 223:24 229:16 283:20 <b>negotiates</b> 223:3 <b>negotiating</b> 71:7 197:25 220:14 230:25 231:12 238:9 249:16 283:5 287:20 <b>negotiation</b> 62:11 202:21 220:25 221:2 225:21 231:1 238:7 296:1 <b>negotiations</b> 26:25 27:3 35:14 35:21 36:7,11 64:15,23 65:7,9
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

65:11 81:11,15 83:6 114:14 176:1 182:18 215:2 230:19 251:3 <b>neither</b> 182:1 <b>nester</b> 18:13 150:21,22 <b>net</b> 64:13,14 152:20 199:7 254:5 <b>netted</b> 97:24 <b>never</b> 100:8 152:3 278:11 <b>nevertheless</b> 23:7 146:11 <b>new</b> 1:3,18 8:5 9:5 9:16 10:3,5 11:12 11:19 12:21 13:4 13:13,21 14:12,21 15:14 16:5 17:11 17:19 18:4,11,20 31:19 42:16 193:3 228:21 288:4 <b>newark</b> 19:6,13 <b>newly</b> 228:19 <b>nice</b> 147:11 <b>night</b> 20:12 190:10 <b>nine</b> 80:5 <b>nj</b> 12:5 19:6,13 <b>nodding</b> 150:4 <b>noes</b> 290:17 <b>non</b> 47:14 115:1 146:10 <b>nondebtor</b> 276:5 276:6 <b>normally</b> 85:16 181:19 221:3 <b>north</b> 7:1 12:11 <b>northstar</b> 18:16 <b>note</b> 45:10,10 53:15 54:8 57:24 61:11 81:10	126:24 127:2 129:2,3,5 136:8 138:20 139:9,15 151:16 153:18 164:13 172:8,18 208:13 289:24 <b>noted</b> 37:3 45:14 <b>notice</b> 26:2,4,10 26:12 28:23 31:10 31:15,18,19,22,22 32:4,5,6,7,9 33:10 33:24 34:1,7,12 34:24 51:23 57:14 77:10,13,17,20,22 78:3,8,23,25 141:7 161:4,8 178:19,19 179:24 183:24 218:7 219:12,17,21 221:23 224:10,11 224:12,13,15 243:17 271:15,15 276:10 278:23 279:17,20 282:16 282:22 294:2 296:5 <b>noticed</b> 146:3 <b>noticing</b> 55:10 <b>notions</b> 225:17 <b>notwithstanding</b> 47:10 227:1 <b>november</b> 41:7 <b>number</b> 20:12,16 32:1 35:19,24 44:19 45:10,15,25 46:24 47:7,8,17 48:17,24 49:4,22 50:22 53:11,14,19 53:20 55:6 56:3 62:14 65:24 68:16 107:7,8 110:18 111:14,16 117:9 123:20 129:4,5	134:3,16 135:1,5 150:12 158:19 190:22 194:5 195:15 196:2,25 204:8,10 205:21 207:13 216:6 231:19 250:7 255:22 258:5,9,11 259:4,5 262:5 265:8 286:19 292:12,20,22 293:1 <b>numbers</b> 36:2 39:7,8 65:25 76:21 124:4,6,8 129:14 130:14 135:6,17,18,19 164:17 171:6 175:4 176:11,12 205:2 220:17 224:20 239:4,5 241:22 254:18 258:25 268:12 269:16 270:13 293:20 <b>numerous</b> 118:14 205:25 <b>nw</b> 10:11,19 <b>ny</b> 8:5 9:5,16 10:5 11:12,19 12:21 13:4,13,21 14:12 14:21 15:14 16:5 17:11,19 18:4,11 18:20 299:24 <b>o</b> <b>o</b> 1:23 20:1 297:3 299:1 <b>o'clock</b> 213:6 <b>o'neal</b> 13:7 169:22 169:22 170:4,7,12 170:16,19,25 <b>o'reilly</b> 19:1	<b>object</b> 32:1 39:6 76:4 83:17 84:25 109:14 160:10 229:23 261:1 264:11 266:16,19 276:13 279:22 280:23 295:8 <b>objectant</b> 44:22 46:17 <b>objectants</b> 150:12 <b>objected</b> 37:16 46:14 85:22 95:21 109:14 158:20 208:18 247:1 252:13 258:1 264:1,2,19 276:7 284:10 <b>objecting</b> 44:9 57:9 258:2 273:21 279:21,23 280:8 <b>objection</b> 2:9,12 2:15,17,19,21,23 2:25 3:2,4,7,10,12 3:12,15,17,19,21 3:24 4:3,6,8,10,13 4:15,17,19,22,25 5:5,7,10,16,19,24 6:3,7,12 23:1 26:15 37:25 38:3 39:2,3,8 43:13 46:2,16 47:16,25 49:3,23 50:23 53:19,21,25 58:13 72:3 94:20 95:20 106:17 108:16 113:9 120:14 124:23 131:16 137:6,7 150:15 151:2 156:5 157:2 190:22 208:24 209:3 212:15 213:4 214:8,11,19 214:19 215:11
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------



218:3 230:2	<b>obligated</b> 111:21	<b>office</b> 9:12,13	77:4 78:1,20 79:1
243:19 256:4	111:23 113:7	10:2,10,18 25:7	79:3 81:6,6 82:20
257:20 264:8	<b>obligation</b> 68:11	31:6 37:3 208:15	82:24 83:3,3,9,14
267:8 268:12	128:13 158:6	243:19 271:21	84:11,15 85:6
269:4 271:24	166:17 216:19	<b>offices</b> 16:18	87:4 88:17 89:17
274:7 276:3,19	<b>obligations</b> 54:16	19:17 146:9	89:22,25 90:5,10
277:1 279:3,6	66:9,12,18 67:2	<b>official</b> 9:2 28:15	90:16,23 93:7,21
289:2,6,16,17	67:22 107:3 227:4	28:19 48:18	94:20 95:16,22
<b>objection's</b> 44:22	<b>observations</b> 88:5	<b>offset</b> 68:3,14	96:19 98:10 99:6
45:6	<b>obtain</b> 43:4	113:1 168:14,20	99:9,13 101:1,2
<b>objections</b> 27:20	<b>obtained</b> 142:16	172:4	101:19 104:18,22
32:2 34:10 41:21	<b>obvious</b> 26:11	<b>offsets</b> 110:19,21	106:1,4,11,21
44:17 45:1,10	<b>obviously</b> 91:19	111:2 112:1	107:10,24 108:9
47:9 50:2 52:5,6,7	131:5 176:3	169:15	109:21,25 110:9
53:15 54:9,11,11	185:25 187:25	<b>oh</b> 49:10,11 70:9	110:13 111:7,13
55:1 76:2 89:12	204:3 220:8	75:12 76:24 85:14	114:17,25 115:11
89:14,20,23 95:10	226:11 275:24	124:13 130:9	115:17,21 116:20
103:23,24 106:2	281:16 293:10	214:12 259:18	118:17 120:8,23
106:12,14 108:13	294:19	269:3 276:15	122:3,10,16,21
114:22 115:2,5,22	<b>occur</b> 142:18	<b>okay</b> 20:2 21:6	123:18 124:2,9,15
117:3 119:9 120:2	143:16 145:22	23:16,25 24:12,20	125:2,5,14,17,25
120:10 121:13,22	146:16	25:11,24 26:9,19	127:18,23 128:6
122:4,17,23 123:1	<b>occurred</b> 135:5	27:12 28:5,7,10	128:19 129:9,11
123:4,7,9,13,20	141:22 190:8	30:19 31:3,3,4	130:13,14,25
123:23 124:19	<b>october</b> 1:20	35:4 37:1 38:14	131:8,17,19 132:9
130:11 131:1,4,17	31:20 41:7 49:3,5	39:5,10 41:25	132:23 133:20
131:22 139:2	49:14 57:13 60:9	42:11 44:13 45:12	134:1,8,11 135:1
144:9 145:16	60:24 81:8 84:1	45:17,23 46:21	135:23 136:18,22
159:8 180:10	193:4 197:11	48:3,13,17,23	137:2,14,25 142:8
202:14 206:24	257:5 299:19	49:11,17,20,25	144:5 147:14,24
208:10 225:10	<b>odd</b> 227:18	50:21 51:3,8,25	148:23 149:15,20
230:9 246:20	<b>oddly</b> 163:11	53:7,10,17,24	150:9,10,17 151:3
252:5,11 253:5,8	<b>odds</b> 140:5	54:2,8,25 55:3,8	153:7,17,23
257:16,25 259:6	<b>offended</b> 188:20	55:10,14,19 56:4	154:25 157:10
260:23 261:3,6,20	<b>offense</b> 236:18	56:6,14,25 57:3	158:7,14 159:15
262:3 263:2,21	286:2	57:13 58:17,24	162:16 163:5
267:9,25 268:23	<b>offer</b> 42:25 59:21	59:11,12,14 60:2	165:12 170:24
270:16,16 277:2	65:2	60:11,14,21 61:3	171:2 172:3,5,19
279:1 288:22	<b>offered</b> 65:4	61:23 62:21 63:4	176:17 179:4
289:8,8 290:4	194:14	64:8 66:8,17 67:5	186:5,23 203:7
<b>objectively</b> 34:11	<b>offers</b> 207:25	67:11,21 70:5,10	206:25 208:5
<b>objectors</b> 136:23	<b>offhand</b> 248:3	70:13,20 71:2,6	212:14,21 213:10
138:20 146:1		72:1 73:23 74:5	214:6,25 215:8

[okay - outstanding]

Page 42

218:14 219:22,22 221:17 223:8 227:12,18 233:16 237:9 238:18 241:8,20 243:10 244:11 246:8 248:8 250:12 254:20 255:14,23 256:18 261:16,18 262:9,25 263:11 263:17,20 264:23 265:5 267:21,23 270:23 271:16,19 271:22 274:20 275:3,23 280:6 282:25 283:20 284:12 285:13 288:23 289:3,7 290:3 291:7,9,10 293:14 <b>old</b> 299:22 <b>omnibus</b> 39:2 120:10 253:7 <b>once</b> 143:3 147:1 147:1 167:3 198:22 199:12 205:11 <b>one's</b> 45:24 60:23 222:21 <b>ones</b> 78:18 103:4 103:6 115:23 116:16 126:6 149:17 176:7 202:7 231:25 233:8 269:5 <b>ongoing</b> 59:3 68:8 163:21,22 206:10 273:2 <b>onslaught</b> 185:23 <b>open</b> 34:16 59:4 69:4,14 112:4 119:12 146:14 167:8 170:6,10	186:4 230:25 280:10 <b>operating</b> 77:15 152:2 <b>operation</b> 47:5 112:13 <b>operational</b> 201:6 <b>operative</b> 273:10 275:2 <b>opinion</b> 102:7,12 <b>opportunity</b> 30:8 68:9 189:18 191:10 195:3 200:11 201:9 271:14 <b>opposed</b> 26:10 31:12 33:25 109:22 137:8 193:7 <b>opposition</b> 186:19 <b>opt</b> 28:23 29:2,9 30:16 31:13,13 32:25 33:2,3,8,12 33:19,19 37:4,6 38:4,19 42:4 43:14,16 74:18 84:13 92:25 94:23 95:4 96:6 149:22 149:25 150:15 151:1 161:5,16 173:17,18,24 174:6 177:5,6,9 178:2,10,10,20 180:21,21 181:6,9 181:9,14 185:14 185:14 189:11 199:12 243:12,14 244:1 271:7 279:12,19,25 280:2 282:4,8 284:7,13,17,19,20 286:15 290:4,5,6 290:15,15	<b>opted</b> 48:1 96:14 179:12 182:1,2 276:8 <b>optimistic</b> 192:18 202:16 <b>opting</b> 48:4 177:16,18 202:3 202:20 <b>option</b> 33:18 41:4 194:14 217:5,5 <b>options</b> 206:2 <b>opts</b> 149:25 161:3 173:20 <b>oracle</b> 99:11 <b>oral</b> 53:18 137:4,8 <b>order</b> 21:3,17 23:15 25:13 26:10 28:25 29:2 30:4,7 46:1,4 47:3,10 49:2 74:24 77:16 77:18,25 98:7 106:12 117:13,22 128:12 131:5 141:16,21 142:11 159:17 164:19 172:10 173:9,21 209:12 213:20,21 213:24 214:1,3 216:20 218:23 219:10 220:23 221:3,14,14,15,22 221:23 223:3,7,9 224:7,8 226:19,24 227:2,9,13 228:7 229:14 230:3,13 233:23 234:17 237:19 238:6,16 256:22,24 257:2 257:22 263:23 264:17 271:11 278:18 281:13 282:10,20 297:17	<b>order's</b> 106:4 <b>ordered</b> 127:20 127:24,25 128:3,7 128:12,15,16 <b>orders</b> 54:17 96:1 97:21,22 98:10 106:7 114:25 115:3 121:25 127:10 170:1 227:23 254:21 257:17,25 268:18 277:9 280:9 <b>ordinary</b> 39:24 40:13,16 41:9 71:21 209:9 210:19 222:1,3 238:12 282:6,24 <b>organized</b> 176:18 <b>origin</b> 95:15 107:12,25 108:8 108:10 109:22 199:19 <b>original</b> 187:10 192:16 204:19 208:25 <b>originally</b> 110:14 291:17 <b>orms</b> 7:24 299:3 299:10 <b>outcome</b> 140:3,14 <b>outline</b> 152:10 <b>outlined</b> 153:3 154:1 <b>outs</b> 50:24 178:10 181:14 290:15 <b>outside</b> 76:5 80:15 96:12 109:23,25 110:4 146:2 196:2 255:15,15 263:6 270:19,21 <b>outstanding</b> 49:1 54:6 77:15 78:12 78:13,17,22,24
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

84:15 102:22 103:1,17 106:24 116:7,15 139:12 147:8 159:13 260:22 <b>overboard</b> 275:19 <b>overlap</b> 294:18 <b>overrule</b> 276:2,18 <b>oversee</b> 140:20 148:21 <b>overseeing</b> 97:7 <b>owe</b> 68:24 69:2 162:12,20 <b>owed</b> 69:11 113:18 114:1 167:6,7 211:22 221:6 <b>owing</b> 195:8	<b>paid</b> 21:15 38:17 38:18 39:12,15,18 40:17,23 41:8,13 41:15 57:22 74:25 127:5,15 128:21 132:12 139:12 143:25 159:9 161:22 162:15 175:10 177:9 181:14,14,19 182:2 187:21,22 189:25 195:3 200:7 202:7 206:3 209:6 222:1,2 223:11,16 225:8 228:10 232:23,23 233:1 234:25 237:6,19 238:12 252:2 255:21 259:16 279:25 280:5 284:24 285:17 <b>pan</b> 252:9 <b>papers</b> 42:4 235:2 255:7 <b>paragraph</b> 47:3 47:10 52:1,2,3,21 58:24 62:13,15 63:1,17,19 64:4 67:19 69:16 73:6 73:25 76:9 77:7,9 79:5 81:10,13 84:1,2,3 86:16,18 87:4,11,14 91:8,8 94:3,11,13 97:16 100:23 103:16,19 103:20 106:23 111:14 114:21 116:6,8,16 117:12 119:8,8 121:17 171:4 183:3 198:21 199:15 219:10 226:24	261:19 263:18 265:16 267:14 <b>paragraphs</b> 52:3 77:7 87:18 91:9 <b>paramount</b> 293:19 295:6 <b>pardon</b> 53:11 <b>paren</b> 129:3 <b>parenthetical</b> 274:19 <b>park</b> 11:11 14:11 14:19 16:3,11 17:9 <b>part</b> 22:7 33:24 33:24 46:16 52:22 59:2 61:15,19 73:11 86:14 95:9 99:22,24 133:13 152:9 154:1,6 177:8 179:20 182:17 192:23 197:6 198:12,20 205:8 206:13 218:3,11 219:2 225:2 237:6 276:2 289:17 <b>partial</b> 53:13 <b>participate</b> 178:4 198:6 <b>participation</b> 29:4 <b>particular</b> 27:4 29:16 99:9 100:10 103:8 114:12,12 114:18 120:14 129:1 132:18 137:22 160:2 <b>particularly</b> 25:6 41:3 98:4 146:5 176:6 231:25 232:10,16 242:21 250:25 283:25 290:5,14 295:4	<b>parties</b> 23:12 24:1 24:13 28:11,22 36:11 45:13 47:17 51:2 53:22 59:20 59:23 64:15,18 138:17 140:17 141:7 148:6 149:7 153:6 159:12,15 162:9 173:11,15 173:17 175:10,12 177:5,8 178:3 179:24 185:24 186:21 191:19 197:25 201:7 213:22 218:7 219:14 225:18,23 248:16 249:9,14 272:3,12 274:18 274:24 278:25 280:21 281:18 285:24 286:6 287:19 <b>partner</b> 55:20 155:25 <b>partners</b> 4:8,19 6:10 16:10 96:25 187:6 272:24 <b>partnership</b> 2:21 47:7 48:11 <b>party</b> 51:21 58:23 77:19 114:2,3 118:6 121:2 146:5 150:15 247:18 248:18 272:3 289:12 290:1 <b>patently</b> 42:5 243:14 <b>path</b> 189:24 204:7 205:4 206:2 <b>pathway</b> 155:10 <b>patient</b> 85:16 <b>patrick</b> 140:23
<b>p</b>			
<b>p</b> 8:1,1 20:1 90:8 <b>p.c.</b> 11:16 16:1 19:17 <b>p.m.</b> 137:13,13 296:12 <b>packed</b> 20:18 <b>page</b> 57:18 63:18 63:18 84:3 94:14 97:17 99:8 100:24 120:8 124:18 126:25 129:9,10 134:20,21 136:7,8 136:14 140:21 141:20 152:10 155:14 164:13 198:11,16,17 199:15 215:11 261:16,17,23 263:3,4,8,11 264:25 265:17 266:9,9,20 275:14 297:5,16 <b>pages</b> 129:10 164:12			

[paul - pick]

Page 44

<b>paul</b> 8:20 9:18 14:14 31:5 55:22 136:2 220:1 271:20	183:24,25 209:15 209:17 228:2	147:5,6 156:13 162:5 179:18 180:8 181:22 187:20,22 188:1 197:14 199:12 202:17,18 223:24 225:7,23 226:1,9 236:16 239:4 243:15 245:3 252:14 253:6 255:2 262:14 264:11 265:12 273:4 274:11 280:12 281:24 283:7 284:25 287:10 288:21 289:8,10,11,20,24 295:22	149:22 197:16 278:1 279:2 <b>permit</b> 23:10 <b>person</b> 26:7 138:15 149:8,19 199:16 200:14,23 295:22 <b>personal</b> 4:6 6:14 <b>personalities</b> 202:23 <b>personally</b> 81:11 87:22,24 <b>persons</b> 156:2 227:5 <b>perspective</b> 178:18 <b>persuaded</b> 245:12 <b>pertains</b> 84:23 <b>peter</b> 10:7 <b>petition</b> 41:7 78:15 96:2 98:1 99:16,18 100:13 100:20 104:1,7 127:11,12,14,14 127:21 128:4,8,10 235:17 254:22 277:8,11 278:1,7 278:8
<b>pause</b> 53:12 56:8 57:4 60:16 62:2 62:25 64:3 81:9 133:1,4,16 151:6 166:7 203:10 207:2 208:8 261:11,15 291:11	<b>payment</b> 21:25 22:3 144:12 156:4 156:13 179:9 180:1 184:21 194:24 206:1 208:23 255:11,12 279:15 <b>payments</b> 62:18 82:4,5 113:14,18 114:3 156:3 209:9 217:13	252:14 253:6 255:2 262:14 264:11 265:12 273:4 274:11 280:12 281:24 283:7 284:25 287:10 288:21 289:8,10,11,20,24 295:22 <b>people's</b> 272:25 <b>peopleready</b> 3:10 <b>peral</b> 6:24 <b>perceived</b> 154:16 <b>percent</b> 32:19,20 32:21 34:13,13 40:24,25 173:19 174:7 179:2,5 181:11 183:12 196:1 202:3 215:23,25 216:1 231:7 232:7 237:17 244:3 248:25 249:3 253:7 279:14 280:1 284:4 292:19 293:1,6,7 294:3,6,17	<b>perspective</b> 178:18 <b>persuaded</b> 245:12 <b>pertains</b> 84:23 <b>peter</b> 10:7 <b>petition</b> 41:7 78:15 96:2 98:1 99:16,18 100:13 100:20 104:1,7 127:11,12,14,14 127:21 128:4,8,10 235:17 254:22 277:8,11 278:1,7 278:8
<b>pay</b> 38:4 39:13 40:9,23 41:18 66:14,19 67:7,13 75:11 79:7 111:21 111:23 112:17,18 113:3,6,25 114:6 139:1 143:4,24 144:18 159:15,18 162:5,14 166:17 200:24 215:15 222:4,20 223:17 229:22 233:22 236:5 240:6 243:4 254:21,23 255:3	<b>pc</b> 12:18 15:1 <b>pcd</b> 71:10 <b>peace</b> 155:22 <b>peachtree</b> 16:21 <b>pearl</b> 4:17 13:10 35:8,10 39:1,3 268:11 <b>pending</b> 53:15 106:17 195:18 201:1 218:20 263:1 264:6 <b>penn</b> 18:10 <b>penning</b> 120:16 <b>pension</b> 10:17 11:2 125:1 152:25 207:4,15	<b>people</b> 23:16 25:21 30:12 32:10 33:7,10 34:15 38:17,18 42:24 44:19 45:1 54:23 84:13 96:22 99:11 144:11,14 145:11	<b>pet</b> 10:7 <b>petition</b> 41:7 78:15 96:2 98:1 99:16,18 100:13 100:20 104:1,7 127:11,12,14,14 127:21 128:4,8,10 235:17 254:22 277:8,11 278:1,7 278:8
<b>payable</b> 100:6 102:22 103:5,10 104:1,4,7,9,12,13 104:16,19 105:12 105:15 128:25 160:7,19,22 161:2 161:10 162:2,7,25 256:12 258:17,21 259:4,5 277:6,21 277:23 278:1	<b>pc</b> 12:18 15:1 <b>pcd</b> 71:10 <b>peace</b> 155:22 <b>peachtree</b> 16:21 <b>pearl</b> 4:17 13:10 35:8,10 39:1,3 268:11 <b>pending</b> 53:15 106:17 195:18 201:1 218:20 263:1 264:6 <b>penn</b> 18:10 <b>penning</b> 120:16 <b>pension</b> 10:17 11:2 125:1 152:25 207:4,15	<b>people</b> 23:16 25:21 30:12 32:10 33:7,10 34:15 38:17,18 42:24 44:19 45:1 54:23 84:13 96:22 99:11 144:11,14 145:11	<b>pet</b> 10:7 <b>petition</b> 41:7 78:15 96:2 98:1 99:16,18 100:13 100:20 104:1,7 127:11,12,14,14 127:21 128:4,8,10 235:17 254:22 277:8,11 278:1,7 278:8
<b>payables</b> 97:24 103:1,14 105:2 161:6 162:11 166:17 259:13,16 260:2,5,5 266:7 277:12	<b>pc</b> 12:18 15:1 <b>pcd</b> 71:10 <b>peace</b> 155:22 <b>peachtree</b> 16:21 <b>pearl</b> 4:17 13:10 35:8,10 39:1,3 268:11 <b>pending</b> 53:15 106:17 195:18 201:1 218:20 263:1 264:6 <b>penn</b> 18:10 <b>penning</b> 120:16 <b>pension</b> 10:17 11:2 125:1 152:25 207:4,15	<b>people</b> 23:16 25:21 30:12 32:10 33:7,10 34:15 38:17,18 42:24 44:19 45:1 54:23 84:13 96:22 99:11 144:11,14 145:11	<b>pet</b> 10:7 <b>petition</b> 41:7 78:15 96:2 98:1 99:16,18 100:13 100:20 104:1,7 127:11,12,14,14 127:21 128:4,8,10 235:17 254:22 277:8,11 278:1,7 278:8
<b>paying</b> 40:1 67:1 67:4,9 156:10,17	<b>pc</b> 12:18 15:1 <b>pcd</b> 71:10 <b>peace</b> 155:22 <b>peachtree</b> 16:21 <b>pearl</b> 4:17 13:10 35:8,10 39:1,3 268:11 <b>pending</b> 53:15 106:17 195:18 201:1 218:20 263:1 264:6 <b>penn</b> 18:10 <b>penning</b> 120:16 <b>pension</b> 10:17 11:2 125:1 152:25 207:4,15	<b>people</b> 23:16 25:21 30:12 32:10 33:7,10 34:15 38:17,18 42:24 44:19 45:1 54:23 84:13 96:22 99:11 144:11,14 145:11	<b>pet</b> 10:7 <b>petition</b> 41:7 78:15 96:2 98:1 99:16,18 100:13 100:20 104:1,7 127:11,12,14,14 127:21 128:4,8,10 235:17 254:22 277:8,11 278:1,7 278:8

[pick - post]

Page 45

<p>138:11  <b>picking</b> 41:10  83:5  <b>picturing</b> 183:14  <b>piece</b> 75:6 125:11  <b>pieces</b> 72:22  <b>pizzi</b> 19:1  <b>place</b> 9:4 77:25  156:11 233:25  275:17 280:15  281:6,13  <b>places</b> 243:15  <b>plains</b> 1:18  <b>plan</b> 2:5,12 21:10  21:11,21 22:14  23:2,9,11 27:18  28:12 29:7 30:22  30:22 31:23 32:1  34:1,2 36:9 38:10  38:20 41:21 44:9  45:18 46:4,14  47:4,11,19 50:2  50:23 54:13 57:14  57:16 62:18 82:17  84:7 92:5,7,11  94:7,20 100:3  115:16,19 117:13  117:22 122:20  125:1 139:2,5  140:12 141:6,13  141:14,20,24  142:17,22 143:3  143:15,19 144:24  146:22 147:16,21  148:11 150:18  151:14,16 152:24  153:5,25 154:2,5  154:14,15,21  155:2,6,8,10,11  155:13,23 156:4  172:21 173:13,16  185:18,25 187:16  188:14 190:24</p>	<p>203:21 204:8  205:2,23 207:15  208:3 209:8 213:2  213:11,11 214:11  217:3,6,12,23  224:15,19 231:18  231:20 233:16,19  236:23 238:21,23  239:19 240:9  242:25 244:25  247:4 248:9,11  256:25 257:3,12  272:5,7,12,21,24  273:2,2,5,5,9,16  273:18 275:16,18  276:13,15,17  278:9,24 280:4  284:6 291:19  292:3 293:15  294:14,23  <b>plan's</b> 185:12  <b>plans</b> 146:5,5,11  152:25 207:15  <b>play</b> 74:10 198:3  236:21  <b>plays</b> 221:11  <b>plaza</b> 13:3 18:10  <b>pleading</b> 27:23  205:19 244:19  <b>pleadings</b> 30:1  187:12 193:2  230:6 276:4  <b>please</b> 42:23 56:7  56:10 60:15 87:4  90:5,6 136:11  137:14  <b>plow</b> 189:24  <b>plus</b> 96:20 103:25  104:6 139:15  223:23 224:2  269:18  <b>pocket</b> 285:1,4</p>	<p><b>podium</b> 55:20  <b>point</b> 25:15,21  26:7 28:9 31:7  33:17 34:5,11,11  40:15,15 41:9  53:5 69:14 74:16  83:19 107:11,25  108:10 109:22,22  132:19 133:23  149:6 151:12  154:22 156:11  158:21,25 162:4  171:4 174:3 183:2  191:16,18 192:1  216:7 219:2,9  220:20 224:14  225:20 229:3  233:4 238:8 242:6  242:6,24 244:15  244:16,19 247:8  251:6 252:4  256:14 259:9,10  263:23 271:1,24  271:25 273:7,13  274:4 275:8,19  279:17 284:23  285:7 286:22  287:1,8 288:14  291:5 294:22  295:24  <b>pointed</b> 199:11  238:22 263:8  <b>pointing</b> 188:1  266:8 291:21  <b>points</b> 31:8 71:17  85:20 137:21  225:25,25 271:24  280:24 288:15,16  288:16 296:7  <b>poke</b> 138:17  <b>poked</b> 239:2,3  <b>policies</b> 80:6</p>	<p><b>policy</b> 25:4 73:1  287:4  <b>poll</b> 149:25  <b>ponce</b> 14:3  <b>pool</b> 74:17 75:1  284:4  <b>pools</b> 203:24  <b>port</b> 95:14 108:7  199:19  <b>portion</b> 39:18  40:24 137:7  160:22 166:20  167:4,5 197:5  <b>portions</b> 61:13  82:16 90:20  <b>posed</b> 186:19  <b>position</b> 43:10  68:11,12,23 69:2  69:5 79:17 165:20  193:19 195:5  199:25 217:15  220:3  <b>positive</b> 200:1  <b>possession</b> 8:3,14  <b>possibility</b> 86:3  97:20 229:15  <b>possible</b> 58:8  62:21,23 64:19,22  69:1 72:11,13,14  75:3 86:5 96:22  102:3 105:7  110:19 118:7  145:10,18 151:25  206:18  <b>possibly</b> 25:7  119:25 195:16,20  <b>post</b> 41:7 78:15  96:2 99:16,18  100:13,20 104:1,7  127:11,12,13,14  127:21 128:4,8,10  155:15 169:13  200:19 204:23</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[post - process]

Page 46

235:17 254:21 277:8,11 278:1,7 278:8 <b>potential</b> 68:10 71:3 72:25 82:13 114:11 136:13 140:18 144:12 194:16 249:12 253:4 254:23,25 <b>potentially</b> 43:15 43:15 64:17 75:6 79:14 82:11 198:5 269:22 <b>pr</b> 4:6 14:5 <b>practical</b> 78:1 283:16,24 <b>pre</b> 104:1,7 128:10 169:12 199:8 204:22 <b>precedent</b> 141:19 144:7 <b>precisely</b> 74:17 <b>preclude</b> 54:15 <b>precluding</b> 47:20 <b>predict</b> 287:14 <b>prediction</b> 135:7 <b>preference</b> 70:1,1 70:14 71:3,25 72:11,19,21 74:19 74:23 75:4 80:4,5 80:18 81:4 86:11 86:12 87:18 136:12,13 139:17 139:23 145:11 152:23 164:3,6,11 175:14 176:13 183:6 195:4 196:9 199:20 206:8 215:22,23 216:1 217:8 225:10 226:6,10 240:4,6 248:21,24 249:2 249:12	<b>preferences</b> 193:25 194:1 195:7 225:14 <b>preferential</b> 69:18 <b>prejudice</b> 37:9 <b>prejudiced</b> 44:6 44:12 <b>prejudices</b> 37:13 42:3 <b>preliminarily</b> 28:6 <b>premised</b> 248:11 <b>premium</b> 196:10 207:17 <b>prepaid</b> 68:4,20 167:20 168:24 <b>prepare</b> 135:4 282:6 <b>prepared</b> 26:21 29:21 30:22 128:18 133:20 134:14 151:1 176:19 <b>prepetition</b> 96:1 127:10,21 128:3,8 128:16 254:21 277:9 278:5,17 <b>preponderance</b> 283:17 <b>present</b> 172:8 <b>presentation</b> 136:20 137:20 154:4 <b>presented</b> 138:21 192:14 <b>presentment</b> 282:23 <b>preserved</b> 52:8,10 <b>pressed</b> 145:16 <b>pressing</b> 145:11 145:11,16 <b>pressure</b> 288:13	<b>presumably</b> 35:23 <b>pretty</b> 27:8 74:24 99:21 135:8 192:18 194:13 202:18 232:14,21 236:4 249:3 275:10,17 <b>prevail</b> 216:20,22 <b>prevailed</b> 216:17 216:18 <b>preventing</b> 273:4 <b>previously</b> 22:20 47:13 54:17,18,19 188:9 <b>price</b> 18:15 <b>primarily</b> 125:8 127:16 163:19 187:5 188:10 <b>primary</b> 24:13 173:6 <b>prime</b> 55:5,16 298:6 <b>principles</b> 222:19 <b>print</b> 126:21 291:24 <b>printers</b> 6:5 <b>prior</b> 50:25 58:1 58:18 97:4,8,10 97:14 98:20 105:5 107:7 127:17 136:14 156:11,15 198:22 266:9 <b>priority</b> 121:18,19 122:4,23 123:14 123:23 124:12,16 125:19,20 126:4,4 126:8,15 152:19 153:7,12 156:3,5 159:21,23 160:1 208:20 252:14,14 252:16 <b>pro</b> 21:23 173:22 174:6 177:6	179:17 181:10 237:17 <b>probability</b> 186:10,14 <b>probably</b> 75:18 80:4,21 81:4 84:18,21 116:19 122:8 137:2 203:17 226:1 231:23 233:9,10 236:22 240:22 261:9 266:19 268:17 292:23 293:25 294:18 <b>problem</b> 25:9 220:9 253:13 279:12,13 291:1 <b>problems</b> 100:12 100:19 280:7 <b>procedure</b> 31:19 32:5,9,12 78:1 94:24 278:10 280:15 281:17 <b>procedures</b> 92:15 215:2 280:8,25 281:12,19 282:10 <b>proceed</b> 27:19 140:2 <b>proceeding</b> 46:6 215:21 218:5 <b>proceedings</b> 296:11 299:5 <b>proceeds</b> 30:10 50:4 62:16 64:5 64:13,14 65:13,17 66:5 87:11,17 139:15 152:21 164:11,14,15 199:7 204:16,23 210:10 <b>process</b> 87:22 96:11,13 99:14,18 99:24 100:1
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

115:25 117:5,19 117:25 118:9,13 146:12 147:11 159:8,8 180:3,4 181:12 188:25 189:4 190:18 192:6 197:19 198:13 199:21 201:23,25 202:21 206:10 218:12 219:19 278:15 282:8 <b>processed</b> 78:15 <b>productive</b> 228:13 <b>professional</b> 63:12 102:7 123:16 201:7 227:5 <b>professionals</b> 29:4 86:12 191:9 193:5 197:23 200:20 207:12,19 220:8 220:13,17,24 221:6 223:4,11,16 223:20 224:4,21 232:6 237:5,10,15 245:10 258:24 296:3 <b>profit</b> 146:10 <b>program</b> 27:25 28:17,21 45:18 53:23 74:19 81:12 84:5 94:5,25 96:11 145:17 148:25 150:16 156:13 161:20 164:23 172:8,10 172:13,22,24 173:12 178:7,23 182:21 187:4 188:4 194:8,11,13 194:14,20 195:23	197:21 202:11 203:6,17 215:2 232:22 <b>progress</b> 17:4 147:3,4,7 148:20 149:3 <b>progressing</b> 96:22 147:9 <b>project</b> 69:23 117:19 <b>projected</b> 46:15 <b>projecting</b> 132:10 <b>projection</b> 248:15 270:22 <b>projections</b> 285:6 <b>promised</b> 252:1 <b>promptly</b> 142:18 <b>proof</b> 21:19 22:11 38:2 44:11 106:19 158:23 <b>proofs</b> 50:5 158:20,22 <b>proper</b> 108:19 217:22 <b>property</b> 12:10 47:14 146:10 165:15 273:23,24 <b>proponent</b> 286:19 <b>proposal</b> 20:24 21:2,5,7,18 22:20 22:25 23:9,15 24:11,14 32:17 209:8,8,9 245:16 <b>propose</b> 27:20,22 148:25 <b>proposed</b> 22:7 32:18 36:8 38:16 49:2 54:10 58:21 170:1 204:11 213:18 219:10 278:22 295:9 297:18	<b>proposing</b> 30:20 32:5 131:16 <b>proposition</b> 30:7 <b>propriety</b> 204:15 <b>prosecute</b> 46:17 200:21 250:4 <b>prosecuting</b> 123:19 155:23 <b>protect</b> 157:8 210:4 <b>protected</b> 157:7 208:17 211:20 222:17 223:5 <b>protection</b> 24:14 158:6 210:14,24 212:1 <b>protections</b> 141:2 <b>proud</b> 187:14 <b>provide</b> 52:15 76:22 155:10 157:1 199:5 200:11 222:13 287:10 <b>provided</b> 23:6 31:16 50:13 132:8 134:6 142:17 150:23 154:23 155:17 199:4 200:6 220:11 225:7 268:20 272:20 <b>provides</b> 23:9 156:2,4 173:14 243:23 <b>providing</b> 132:7 222:16 <b>provision</b> 25:6 42:5 147:17 153:2 159:14 201:18 210:4 274:12 275:24 276:1,15 <b>provisions</b> 47:4 47:20 238:16	272:21 275:18 <b>puerto</b> 6:14 <b>purcell</b> 17:5 <b>purchase</b> 254:6 268:18 <b>purchased</b> 35:22 <b>purchasers</b> 190:1 283:8,8 <b>pure</b> 242:10 <b>purely</b> 186:3 206:4 <b>purpose</b> 272:12 <b>purposefully</b> 280:8 <b>purposes</b> 21:18 59:22 170:23 171:5 195:10,11 <b>pursuant</b> 197:20 <b>pursue</b> 204:6 205:7,9 231:22 <b>pursued</b> 204:21 <b>pursuing</b> 65:6 206:8 <b>pursuit</b> 205:16 <b>pushed</b> 41:19 44:2 189:23 243:3 <b>put</b> 29:19 30:8 31:14 42:25 69:20 77:24 79:11,17 92:19 104:5,20 129:6 139:17 146:2 156:11,16 159:16 164:4 172:13,24 178:9 183:5 185:3 196:16 204:5,25 207:9 223:15 233:18 258:11 282:7 287:14 296:8 <b>puts</b> 32:25 146:23 <b>putting</b> 29:6 137:19 201:5
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[putting - reasonably]

Page 48

258:12	<b>quimby</b> 12:3	<b>reach</b> 175:17	152:3,9 153:4
<b>q</b>	<b>quite</b> 26:1 158:18	193:6 207:23	154:5,9 155:3,10
<b>quarropas</b> 1:17	181:7 242:9	<b>reached</b> 21:1	159:5 164:2
<b>quarter</b> 147:1	<b>quoted</b> 137:6	24:25 50:17 189:1	166:14 173:13
<b>quarterly</b> 218:4	<b>quoting</b> 57:20	205:17 206:2	177:3 180:19
<b>question</b> 25:22	<b>r</b>	246:6	184:2,14,15 187:5
26:13 43:2 58:14	<b>r</b> 1:23 8:1,11,20	<b>reaching</b> 190:9	187:17 189:11
65:1 66:24 80:18	16:15,16 20:1	<b>react</b> 295:19	191:7,18 193:4
83:20 85:1 94:1	56:12,12 60:19,19	<b>reacting</b> 242:1	194:9 198:4,14
103:3 105:4,6	90:8 180:18	<b>reaction</b> 238:23	200:15 203:21
107:20 108:12	188:12 297:14	<b>read</b> 32:17 34:10	210:24 212:5,17
109:8,10 113:11	299:1	42:4 47:19 73:11	220:6 223:1,21
113:12 116:10	<b>raise</b> 56:9 60:17	75:20 94:12	225:22 226:9
117:18,19 118:16	83:19 90:6 147:14	126:24 136:10	230:5 231:13
122:20 124:1,15	172:15 183:17	144:4 146:1	234:4 244:9 247:5
126:13 132:3,22	253:5 271:24	198:20 201:14	251:18,23,24
134:12,13 139:20	288:11	244:8	252:15,16 256:10
149:13 167:23	<b>raised</b> 47:17	<b>reading</b> 63:23	260:12,16 275:16
185:5 213:18	185:6 204:15	73:15 74:3 88:8	275:19 283:5,9
227:17 234:3	215:10 219:11	147:16 222:19	284:23 286:1
239:18 281:1	225:20	<b>ready</b> 30:10 42:22	<b>realm</b> 101:18
293:16,16	<b>raising</b> 219:3	218:6,8	<b>realty</b> 2:21 47:7
<b>questioned</b> 82:3	<b>ralph</b> 140:23	<b>real</b> 47:14 65:13	48:11
82:22 83:1	<b>range</b> 69:20	65:16 140:10	<b>reargue</b> 40:14
<b>questioning</b>	151:12	146:17 155:5	<b>reason</b> 36:19
259:23	<b>ranges</b> 58:9	175:1,19 191:24	37:13 171:15,21
<b>questions</b> 59:13	<b>rata</b> 21:23 173:22	217:8 249:20	172:12 183:17
62:1,7 73:23 76:6	174:6 177:6	286:12 293:16	188:9,9,17,21
76:24 79:2 81:7	179:17 181:10	<b>realistic</b> 246:19	195:25 197:9
86:10,15 88:22	237:17	296:3,5	229:5,23 247:19
89:2 93:6,12 99:4	<b>rational</b> 226:13	<b>reality</b> 229:15	256:24 257:10
135:22 136:17	<b>rationale</b> 177:14	238:9 283:16	258:6 265:19
137:23 141:5	178:11	284:14 285:15	287:22
154:2 189:6 203:5	<b>rationally</b> 34:11	292:3	<b>reasonable</b> 27:9
203:5 217:11	<b>raw</b> 100:8	<b>really</b> 29:3 34:10	30:15 69:21
<b>quick</b> 271:21	<b>ray</b> 8:8 27:15	42:12 46:16 49:6	175:11 186:9,14
<b>quicker</b> 175:10	44:14 137:17	53:3 69:25 83:18	228:20 245:6,16
<b>quickly</b> 44:16	290:8	113:3 126:21	248:22 270:21
74:22 75:9 82:9	<b>raynor</b> 11:6 207:3	138:4,10 139:16	<b>reasonableness</b>
82:18 132:12	207:4 208:6	140:9 142:24	151:12
151:7 202:19	<b>rdd</b> 1:4 2:1 7:3	144:12,13 145:10	<b>reasonably</b> 33:11
206:17,21 234:25	<b>rea</b> 47:1	147:19 148:7	80:12 142:13
242:10		149:4 151:22,24	



<b>rebuttal</b> 186:18	<b>reconcile</b> 151:24	258:20 270:9	<b>reduction</b> 68:10
<b>recall</b> 76:1 83:13	180:9	277:6,12	111:6,7 127:13
132:18	<b>reconciled</b> 158:23	<b>recoupment</b> 47:15	<b>reductions</b> 127:2
<b>receipt</b> 82:5 95:14	202:6	47:21 54:14,16	127:3,16 129:7
95:15 107:15	<b>reconciliation</b>	<b>recover</b> 64:14	<b>refer</b> 67:25 75:22
108:4,5,6,7,19,23	108:2 129:8 149:3	69:13,24 70:15,21	75:24 86:16 95:8
127:6 173:24	159:8 163:10	70:22,22 71:3	99:9,10 106:24
199:19	164:18 167:4,6	80:9 82:18 226:13	107:11,17 114:21
<b>receivable</b> 68:4	169:15 170:4	235:21 250:3	119:9 120:5 176:2
97:23 100:6	172:1 175:22	<b>recovered</b> 65:23	187:3
168:24	176:3,9 180:3	250:1	<b>reference</b> 45:11
<b>receivables</b> 68:15	181:12 197:19	<b>recoveries</b> 66:2	63:14 77:9 94:18
100:9 110:24	198:7 199:2	69:17 70:14 71:4	121:19 129:17,18
112:1 167:20	201:23,24 202:5	72:21 73:1 74:22	<b>referenced</b> 105:1
<b>receive</b> 62:21 69:8	235:9	74:23 75:4 80:5	203:23
152:15 156:3	<b>reconciling</b>	86:11 136:13	<b>referred</b> 116:16
173:18,22 177:6	100:17,18,20	138:4,8 140:8	128:20 182:17
209:5 262:21	180:11 281:8	154:16 183:6	<b>referring</b> 62:18
<b>received</b> 36:21	282:5	193:23 195:12	73:8 81:19 84:9
55:17 56:24 60:6	<b>record</b> 35:17	196:9 217:9 240:4	84:16 94:3,16
61:6 121:4 127:9	48:12,21 59:22	240:6 248:1,24	100:21 103:2
127:11,13,14,17	87:4 126:24 127:6	<b>recovery</b> 18:17	105:22 115:18
127:19,21 128:10	137:15 155:3	43:16 46:15 66:12	117:10,11,11
191:19 231:8	162:20 170:9	69:20 70:6 71:19	123:13 128:17
262:17	172:18 212:15	71:23 80:7,23	132:14,20 133:9
<b>receives</b> 152:19	230:2,8 243:5	173:19 174:7	286:17
<b>receiving</b> 28:22	250:6,17 252:25	175:14,16 181:11	<b>refers</b> 63:1 73:10
<b>recess</b> 137:13	253:23 257:4,12	185:13 187:16	77:7 106:1,23
<b>reciprocal</b> 47:5	258:10,25 276:2	188:15 191:2	<b>reflect</b> 105:12
<b>reclassification</b>	289:1,6,11,25	205:21 293:25	293:21
130:23	291:23 295:23	294:1	<b>reflects</b> 21:5
<b>reclassifications</b>	299:5	<b>recross</b> 88:20	23:25
257:16	<b>record's</b> 51:14	<b>redacted</b> 4:2	<b>regard</b> 96:5
<b>reclassified</b>	72:1	<b>redirect</b> 85:13,18	105:22 118:4
119:10,14,22	<b>recorded</b> 99:10	136:1,4	138:4 281:20
266:25 267:10,15	107:14	<b>reduce</b> 82:14	<b>regarding</b> 43:10
267:17,18 268:4	<b>recording</b> 281:11	127:2 167:25	49:1 79:25 94:2
269:4	<b>records</b> 97:8,14	193:23 205:9	138:5,7 155:15
<b>reclassify</b> 131:2	104:13,16,19	267:15 268:7	199:18
<b>recog</b> 25:16	105:11 107:13,14	<b>reduced</b> 38:19	<b>regards</b> 120:18
<b>recollection</b>	107:15 108:3,3,24	110:18 168:24	132:7
132:21	113:22 160:7	184:24 204:18	<b>regulatory</b> 203:24
	161:13 162:1	267:11	247:14,17

<b>reimer</b> 16:16 <b>reissue</b> 255:9 <b>reject</b> 294:3,4 <b>rejected</b> 292:8,19 293:4 294:6,16,17 294:19 295:12,13 <b>rejection</b> 292:19 293:6 294:6,7 295:18 <b>relate</b> 118:2 120:11 126:5 127:16 131:1,17 <b>related</b> 47:12 103:25 104:7 110:3 126:9 136:12 166:20 169:24,24 185:25 <b>relates</b> 50:25 53:2 69:17 95:16 120:14 131:13 198:6 267:2 <b>relating</b> 50:24 96:8 121:14 122:17 126:3 127:10 260:21 <b>relative</b> 295:7 <b>relatively</b> 202:19 <b>relator</b> 90:25 208:12 <b>release</b> 48:1 153:2 251:11,12 272:2,9 273:7,8 274:12,16 274:18,18 275:2 275:18 276:5,6,9 276:14 <b>released</b> 249:18 272:2 274:24 <b>releasing</b> 50:24 <b>relevant</b> 30:23 247:6,6,9 248:7 <b>reliable</b> 259:1 <b>relied</b> 30:12 255:2	<b>relief</b> 30:7 <b>relive</b> 227:13 <b>reluctance</b> 146:14 <b>reluctant</b> 242:19 <b>rely</b> 86:11 89:7 195:10 276:4 277:5 <b>relying</b> 66:1 78:19 183:5 184:3,3 226:18 228:16 274:16 <b>remain</b> 54:5 95:7 <b>remainder</b> 54:5 86:1 186:17 <b>remaining</b> 21:23 21:25 78:20 119:11 277:23 <b>remember</b> 132:15 134:11 166:16 293:22 <b>reminds</b> 150:10 <b>remnant</b> 74:21 80:7 163:20 <b>reorganization</b> 222:21 <b>reorganizing</b> 222:23 <b>rep</b> 282:1 <b>repeat</b> 94:11 283:12 <b>repeating</b> 44:8 <b>rephrase</b> 131:13 132:3 <b>replacement</b> 157:3 208:19 210:9 212:8 <b>replenished</b> 205:14 224:1 <b>report</b> 20:25 147:3,4 219:20 <b>reporter</b> 299:13 <b>reporting</b> 147:6 199:4,6 218:4	219:19 281:25 <b>represent</b> 35:8,24 57:8 125:18 127:3 200:12 241:3 244:20 283:2 <b>representation</b> 190:14 197:18 <b>representative</b> 23:5 197:12 198:1 198:2,18,25 199:10,13 200:2,5 201:19,22 206:20 241:15,18 281:4 291:3 295:17 <b>representatives</b> 201:2,25 <b>represented</b> 27:3 278:13 <b>representing</b> 44:21 241:4 286:23 295:23 <b>represents</b> 283:6 <b>request</b> 23:13 128:2 137:4 185:24 218:1 243:13 <b>require</b> 44:25 62:16 79:8 146:5 195:19 213:21 <b>required</b> 62:24 68:11 159:9 278:24 <b>requirement</b> 156:6,14 157:1 159:18 164:19 <b>requirements</b> 23:6,8 26:23 <b>requires</b> 141:8 246:23 280:4 <b>requiring</b> 80:3 178:5 <b>reservation</b> 2:9 3:24 4:3,22 5:7,11	49:18 <b>reservations</b> 29:16 <b>reserve</b> 21:12,22 91:24 92:10,22 93:1 156:7,11,16 157:2,8 198:23 206:23 226:25 <b>reserved</b> 156:19 209:6 <b>reserves</b> 156:22 <b>reserving</b> 209:16 <b>residential</b> 47:14 <b>resolution</b> 23:19 27:7 30:15,20 52:16 53:14 82:10 117:3 173:23 199:21 286:7,7 <b>resolve</b> 46:1 52:19 96:4 201:1 280:11 <b>resolved</b> 27:21 44:17,23 45:1,7,9 45:14,16,17 46:10 46:24 47:8,9 48:12,22 49:15,16 49:24 53:15,20,25 54:1,10,12 55:1 68:5 94:22 95:22 96:10 171:13 175:20 236:23 <b>resolves</b> 50:22 <b>resolving</b> 25:5 49:2 85:25 <b>resources</b> 140:13 152:8 180:9 189:22,23 191:2 <b>respect</b> 32:6,20,21 43:5 53:6 54:9 73:18 81:18 85:21 87:18 98:25 141:1 171:8 195:9 198:1 204:10,11 208:21 209:13,13 230:4
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

258:23 291:23 292:4 <b>respectfully</b> 211:2 239:3 245:17 287:22 <b>respective</b> 27:6 <b>respectively</b> 61:5 <b>respects</b> 208:24 <b>respond</b> 76:13 77:1,2 201:1 206:23 <b>response</b> 6:1 34:18 35:17 85:10 105:4,6 135:25 137:1,7 209:3 219:10 <b>responses</b> 290:17 <b>responsible</b> 67:4 140:7 <b>rest</b> 55:2 61:24 90:22 167:25 246:10 282:17 <b>restates</b> 72:3 <b>restrictive</b> 47:2 <b>restructuring</b> 79:16 144:8 145:6 148:8,21 149:2 158:25 160:4 197:15 198:24 199:17 281:5 <b>result</b> 27:1 43:4 62:22 102:9 115:24 231:20 273:18 285:14 287:14,20 <b>resulting</b> 71:22 <b>results</b> 97:21 217:8 295:4 <b>resume</b> 295:19 296:7 <b>retail</b> 112:13,14 114:12	<b>retained</b> 71:9,25 <b>retaining</b> 67:3 <b>rethink</b> 228:3,5 <b>retiree</b> 3:2 7:5 20:14,23 21:1,10 21:21 23:1,4,18 26:3 297:19 <b>retirees</b> 19:11 21:13 22:16,21 23:5,21 25:1 27:2 27:5,6 28:20 48:18 <b>return</b> 51:11,14 <b>returned</b> 50:5,6 <b>returns</b> 127:6 <b>review</b> 81:21 94:24 122:17 199:2 213:3,5,8 218:7,11 249:19 279:1,18 280:22 281:18 <b>reviewed</b> 88:2 171:7 <b>reviewing</b> 250:24 <b>revised</b> 21:2,3 23:14 57:14 <b>revisit</b> 227:23 <b>revolves</b> 128:9 <b>rewrite</b> 54:19 <b>rico</b> 6:14 <b>ridiculously</b> 287:25 <b>right</b> 20:15 22:5 24:16 25:24 26:5 26:19,21 30:25 31:1,11 32:8 33:4 33:6,8,10,12,14 33:25 35:2 37:8 38:11 40:8 41:17 42:1,11 43:12,20 45:4 46:3 47:14 47:16 48:6,19 49:13,19 50:16	51:10,16 53:4,7 53:24 56:9 60:2 60:17 61:25 63:19 63:20 68:12 69:19 69:22 75:4,20,22 76:14 80:16 81:2 82:8,12 86:9 87:9 87:19,25 88:6,8 89:6 90:6,16 95:11 98:25 100:19 105:6,10 105:16,18 106:8 109:2 110:9 112:7 113:21 116:3,15 117:6,18 118:2 119:19,24 120:3 121:7,11 123:18 124:4 130:7,17 135:21 142:4,9 143:17 145:14 146:7 147:23,25 148:5,23 150:2,13 150:19 153:11,15 157:20,22 158:8 159:17,25 160:1 161:21 162:8,18 163:13,18,24 165:21,24 166:13 166:22 167:4,11 168:7,18 169:7,10 169:16,18 171:2 171:25 172:5,5,6 174:18 177:17 180:17,20,22 181:4,4 182:3,19 183:1,7,10,13 184:1,11,13,16,18 184:18,20,23,25 185:16 186:2 196:10 201:21 204:9 209:19 210:11,13,17 212:4 214:18,24	215:12 216:14 218:2,16,16,16,18 218:19,22 219:13 221:7,20 226:5 227:15,18,21 228:6 229:1 230:1 230:24,25 231:13 231:13 233:20 237:7 239:18 240:14 244:2,6,7 246:11,21,23 247:16 248:4 250:21 251:4,15 254:12,16,19 255:10,16,25 256:9 258:16 259:4,20 260:10 261:7,10,12,22,23 262:8,8,10,23 263:2,14,19,22 264:3 265:15 267:1,4,6 268:2,5 268:22,25 269:2,8 272:1 273:10 274:14 275:15 279:4,11,12 280:22 281:15,22 282:14,18,25 284:7,13 289:3 290:16 293:5,13 294:9 <b>rights</b> 2:9 3:24 4:3 4:22 5:7,11 27:5 31:25 32:23 33:21 40:25 46:5 47:12 122:17 141:1 155:18 157:6 207:14 220:24 225:18,24 226:2,2 230:12,13 238:8 238:15 245:12 273:1 289:12,24 289:25,25
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<b>rise</b> 28:12 152:9	<b>ruled</b> 165:7,14	<b>satisfied</b> 23:5 73:7	266:15,16 268:21
<b>rises</b> 229:20	166:19 167:2,4,5	127:5 158:18	269:14,22 278:2
<b>rising</b> 274:8	168:12 213:19	228:24 264:3,9,10	282:10 289:23
<b>risk</b> 41:13 181:24	216:17	264:13,24 265:2,4	290:9 292:15
182:1 183:14	<b>rules</b> 228:7	<b>satisfies</b> 30:22	<b>says</b> 30:11 32:6,20
184:15,20,22	<b>ruling</b> 43:22	205:3	44:22 52:3,5
195:1 229:17	268:1 289:23	<b>satisfy</b> 37:17 74:2	57:18,24 63:22
286:16	<b>rulings</b> 43:9	74:6 138:22	73:20 76:9 79:6
<b>risks</b> 234:8	<b>run</b> 164:17,17	212:14 226:12	81:14,20 94:14
<b>risky</b> 194:15	<b>runs</b> 45:20,20	227:4 254:18	96:20 103:22
248:12	<b>rutherford</b> 8:19	<b>save</b> 73:23 76:24	124:19 127:2
<b>road</b> 299:22	<b>s</b>	85:4 137:7 144:13	129:15 130:4,22
<b>robert</b> 1:24	<b>s</b> 2:13 8:1,10 20:1	175:9 186:17	133:6 134:16
<b>rocco</b> 18:6	56:12 138:11	205:24	142:20 143:18
<b>roebuck</b> 22:13	159:11,13 263:13	<b>savings</b> 185:21	159:14 198:11,21
294:5,15,17	266:21 297:3,14	<b>saw</b> 151:24	226:19,25 237:19
<b>rogers</b> 16:18,25	298:3	153:17,19 189:17	238:11 247:4
289:4,4	<b>s.d.</b> 275:14	190:10 192:13	250:23 261:19
<b>role</b> 97:4 98:25	<b>sadly</b> 193:9 208:9	193:1 202:13,14	264:23 267:8
198:2 200:14	<b>sale</b> 139:25	216:5 287:5	268:12 274:25
<b>rolled</b> 176:10	207:13 208:18	<b>saying</b> 37:18,20	<b>scenario</b> 203:1
<b>room</b> 1:17 10:12	275:21	41:2,5 42:6,7	236:3,6 246:19
114:14 284:24	<b>sales</b> 283:17	45:18 62:23 68:14	<b>schael</b> 12:1,7
286:1 287:15	<b>salient</b> 21:7	76:25 77:22	276:22,25,25
<b>rooney</b> 12:18	<b>salt</b> 43:1	102:24 109:2	277:15 278:6,21
<b>rosa</b> 3:17 5:24	<b>samil</b> 17:4	111:25 127:24,25	279:10,13,23
14:2	<b>san</b> 14:5	132:15 141:25	280:7
<b>rosenbloom</b> 4:2	<b>santa</b> 3:17 5:24	143:22 157:14	<b>schedule</b> 130:4
<b>rothschild</b> 14:17	14:2	162:10 171:19	135:4,10
<b>rough</b> 220:17	<b>sara</b> 9:8	215:19 217:14,16	<b>schein</b> 18:22
268:12	<b>sarachek</b> 17:2,13	217:23 218:3	<b>scheme</b> 239:14,17
<b>roughly</b> 80:24	189:17 283:1,1	226:7,9,17 227:9	<b>schemes</b> 248:12
109:14 125:5	284:3,8,14,20	227:22 230:16	249:21
196:3 253:14	285:3,8,10 286:24	231:7,9,14,17,19	<b>school</b> 3:15 5:16
<b>round</b> 36:2 39:7,8	287:2,7,21 288:2	232:4,25 234:19	11:17 15:2 49:23
123:20 130:14	288:6,19	236:2,4,15 237:23	50:6,18,20 51:18
224:20	<b>sarachek's</b> 192:3	238:25 241:24	206:16
<b>rubio</b> 13:23	<b>sat</b> 83:17 188:19	242:2,13,14	<b>schrock</b> 8:8 27:15
<b>ruby</b> 281:17	<b>satisfaction</b>	244:10,12 246:2,9	27:16 28:7,10
<b>rude</b> 275:11	152:16,21	250:2 251:16,16	30:24 31:2,4
<b>rudely</b> 275:11	<b>satisfactory</b>	253:18 254:2	33:23 44:14,15,20
<b>rule</b> 52:18 226:13	142:12	257:3 259:13	44:22 45:4,8,13
228:5,6,7,13		260:12,20 264:13	45:19,22,24 46:7

46:9,12,18,21,23 47:18,23 48:2,4 48:17,20,24 49:7 49:10,12,14,16,19 49:21 50:1,7 53:10,13,18 54:1 54:3,14,21 55:3 55:11,13,19 137:17,18 138:1 141:12,15,18,23 142:2,5,10,19 143:2,5,7,9,12,17 143:21 144:1,4,6 144:21,23 145:1,3 145:5,15,24 146:3 146:7,15,18,21,24 147:4,18,23,25 148:3,6,10,12,14 148:18,24 149:9 149:13,16,21,23 150:2,6,8,10,14 150:18 151:4,7 153:9,12,14,16,18 153:21,24 154:7 154:11,13,20 155:1 156:24 157:5,10,12,14,17 157:20,22,24 158:1,4,7,10,15 159:25 160:16,20 161:7,12,14,17,23 162:3,9,12,15,17 162:19 163:3,9,13 163:18,22,25 165:1,4,6,9,12,17 165:21,24 166:3,5 167:17 171:6 172:6,20 173:4 174:2,4,10,13,16 174:19,24 175:2,5 175:8 176:5,8,12 176:18,22,25 177:2,13,17,20,22	177:24 178:13,17 178:25 179:2,6,10 179:15,19,21 180:6,20,22,24 181:1,4,20 182:3 182:9,12,15,19,23 183:1,7,10,13,16 183:19,22 184:1,6 184:11,13,16,18 184:20,24 185:1 185:11,16,20 186:3,6 189:6 192:1 205:23 212:3 219:3 239:2 271:11 281:1,3,14 281:20,23 282:12 282:14,18,21 290:8,8,12,16,19 290:22 291:9 295:16 <b>schumacher</b> 5:14 <b>schwartz</b> 16:7 212:19,23,24 213:7,10 214:6,9 214:12,21,23,25 215:8,12,14,20 216:2,5,9,12,15 216:22 217:1,5,14 217:21,25 218:13 218:15,18,21,23 219:5 <b>schwartzberg</b> 9:18 31:5,5,19 32:10,25 33:5,14 34:4,19 35:2 271:20,20,23 272:6,8,14,18 273:6,11,21 274:1 274:4,20,23 275:22 276:4,20 <b>scope</b> 76:5 112:19 <b>score</b> 245:16	<b>scratch</b> 176:20 <b>sculpture</b> 46:8 <b>se</b> 213:11 <b>sean</b> 13:7 169:22 <b>sears</b> 1:10 2:1,6 7:3 20:2,7 22:13 25:3 57:16 97:2,4 97:8 98:14 99:1,2 120:6,11,23 121:3 121:14 137:15 162:23,24,24 222:22 234:24 285:16 288:4 293:25 294:2,5,15 294:16,16 <b>seat</b> 90:5 190:3 191:7,16 220:14 245:23 <b>seated</b> 137:14 <b>second</b> 2:5 27:18 37:9,9 40:7 46:11 57:15 73:10 79:6 81:13 88:15 120:9 165:17 177:7 178:16 179:10,15 179:20 180:5 181:12,13 192:9 265:6,24 <b>secondly</b> 196:14 200:14 <b>section</b> 23:7,8 26:24 107:3 132:19 246:23 247:2 254:6 257:4 257:6 271:25 272:20 274:23 275:2 <b>sections</b> 132:13 246:22 <b>secured</b> 74:3 77:14 78:12,13,17 78:20,22 91:10,16 91:20,24 92:10,22	93:1 156:6,10 159:22 210:2 229:11 234:5,18 <b>securian</b> 21:15 <b>security</b> 156:5 157:17 272:23 <b>see</b> 34:2 42:12 54:3 62:18 63:2,5 63:15,23 64:5,10 65:14,20 66:9 67:23 68:1,5 73:8 73:15 74:3 77:10 77:11 81:23 91:9 94:15,17,18 98:12 102:15 106:25 107:3 114:23 133:24 136:8,11 149:11 158:5 163:7 180:17 182:11 185:12 188:12,13 189:18 191:5 193:5 197:22 198:15,21 202:19 212:7 214:2 217:6 220:7 220:11 240:24 241:13 242:2 247:9 257:9 263:5 263:5 264:9,23 266:14 273:14 280:11 284:3,24 285:4,20 286:20 287:12,13 295:25 296:5 <b>seeing</b> 28:8 210:25 283:13 <b>seek</b> 101:15 185:6 <b>seeking</b> 31:23 131:1 155:7 204:19 208:22 218:21 219:5 <b>seemingly</b> 291:20
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[seen - shown]

Page 54

<p><b>seen</b> 66:20 187:12  <b>segal</b> 18:8,8  150:22,22  <b>segregate</b> 196:11  <b>segregated</b> 92:19  92:24 196:17  209:11  <b>selected</b> 140:20  149:10,12 199:12  <b>selection</b> 149:16  <b>sell</b> 140:4 284:15  <b>send</b> 77:19 178:19  <b>senior</b> 96:25  152:21  <b>sense</b> 42:19 80:25  125:22 175:6,7  181:22 190:2  192:7,8 218:11  229:18 245:11  265:13 283:18  286:5,6  <b>sensitive</b> 146:24  177:24  <b>sent</b> 77:23 278:7  <b>sentence</b> 62:15  67:25 73:10 79:6  81:13,13,20 99:13  <b>separate</b> 158:6  166:12,13 179:1  223:7 230:18  250:1 251:13  259:9 267:21  275:24 281:17  288:5  <b>september</b> 56:2  56:15 60:9,23  63:5 90:4,12  191:5,5,15 192:9  192:15,19 193:4  <b>serious</b> 112:16  113:17 239:24,25  249:8</p>	<p><b>seriously</b> 230:5  <b>seritage</b> 287:7  <b>serta</b> 16:19 289:5  <b>serve</b> 149:1  199:16  <b>served</b> 286:19  <b>service</b> 4:13  <b>services</b> 5:19  222:14 225:5,7  <b>serving</b> 281:5  <b>set</b> 25:21 48:21  51:23 86:12 101:2  101:8,11,16,19  159:6 164:5  167:25 170:11,14  181:7 189:2 194:8  234:10 250:22  291:16  <b>setoff</b> 47:15,20  54:14,15,15,15  <b>sets</b> 87:1 206:2  226:24  <b>setting</b> 22:15  239:1  <b>settle</b> 37:20,21  38:15 42:7 64:18  75:8 96:16,17  117:4 207:19  242:19,20 249:9  287:9  <b>settled</b> 26:1,23  33:7 84:7 94:7  96:23 141:5,6  142:2,6 155:16  173:18 182:21  251:3 289:9,16,21  289:22  <b>settlement</b> 21:14  22:8 24:18,25  26:14 27:6,9  28:24 35:11 36:4  36:8,12 37:20  38:8 43:6,7,13,14</p>	<p>50:10 65:10 71:8  71:11 73:2 80:6  84:12 92:15 94:3  94:10,22 95:23  96:4,10,22 100:3  125:4 139:4,5,6  151:8,13,13,14,15  151:16,17,19  152:10 153:4,25  154:3,5,7,14,15  154:22,23,24  155:2,6,6,6,12,14  155:17 160:1  175:13 177:9  178:4 190:12  191:24,25 192:11  193:11 194:2  201:16 204:12,14  204:17 207:16,22  208:4 242:21  243:11,23 278:22  279:4,24,25 280:5  280:13,22 281:25  282:4,4 283:13,14  283:16 284:6  286:21 289:17  291:18,19 293:17  295:9,12 297:18  <b>settlements</b> 72:25  74:21 151:20  155:20 206:11  291:20  <b>settling</b> 32:18  37:12 38:13  <b>seven</b> 269:4  <b>seventh</b> 120:10  265:3  <b>seventy</b> 265:14  <b>severe</b> 207:11  <b>seyfarth</b> 17:15  61:9 90:18 291:13  <b>shanghai</b> 17:5</p>	<p><b>share</b> 21:21,23  144:15 173:22  174:6 177:6  181:10 196:15  213:20 291:25  <b>shared</b> 81:16  181:16 190:5  <b>sharing</b> 281:17  <b>sharon</b> 19:23  <b>shaw</b> 17:15 61:10  90:19 291:13  <b>sheet</b> 36:6 150:24  <b>sheila</b> 7:24 299:3  299:10  <b>shell</b> 272:16 274:2  274:5  <b>sherri</b> 7:24 299:3  299:12  <b>shifting</b> 291:15  <b>shinn</b> 12:2 276:25  <b>ship</b> 121:8 222:8  <b>shipping</b> 222:5  <b>shirt</b> 125:12  <b>shock</b> 202:24  <b>shoes</b> 34:20  <b>short</b> 27:25 79:8  79:12 143:14  <b>shortfall</b> 80:10,20  88:6,10,13 169:25  251:19 253:20,21  254:3  <b>shortly</b> 36:8 204:5  <b>show</b> 30:22  104:19 105:15  127:6 132:13,25  133:9 201:17  211:20 255:1  <b>showing</b> 37:15,17  44:11 133:6  164:10 186:8  266:3 270:9  <b>shown</b> 136:6  270:25</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[shows - speaks]

Page 55

<b>shows</b> 233:2,4,7 233:12 286:14	167:3,9,12,14 169:23 171:3,11 171:14,17,20,22 171:24 172:1,4 219:8,8,14,17,20 235:13,13,23 274:8,11,15,21 275:1,4,7	<b>slightly</b> 74:9 130:12 258:11 291:15 292:23	<b>sorry</b> 20:3 32:21 44:7 49:10 61:16 63:16 74:14 85:14 101:22 103:18 109:7 124:11 130:9 131:15 133:8 151:4 156:20 164:24 167:10 190:21 193:20 197:11 198:10 225:16 228:15 232:1 237:4 241:16 243:25,25 256:19 256:23 261:9 267:13,17 271:3 284:13
<b>sic</b> 86:19		<b>slip</b> 125:8	
<b>side</b> 65:2 73:22 138:8,10,13 176:11,16 193:7 225:15 238:7 242:21 249:14,15	<b>single</b> 155:23 158:23 175:18 186:15 252:11 265:23	<b>small</b> 113:23 126:21 291:24	
<b>sidebar</b> 114:10	<b>sir</b> 56:13,19 59:14 214:24 215:6 216:25 217:1	<b>smaller</b> 43:12 175:21	
<b>sided</b> 189:12	<b>sit</b> 145:21 158:12 175:3 211:25 212:19	<b>smart</b> 253:15	
<b>sign</b> 57:22 271:11	<b>sitting</b> 56:17 60:25 90:13 122:21,25 175:12 176:9 193:7 214:2	<b>smith</b> 3:12 6:19 16:1 212:24	
<b>signed</b> 279:9 283:7	<b>situated</b> 216:18	<b>soft</b> 99:11	
<b>significance</b> 213:12,13	<b>situation</b> 187:18 203:1 209:2,25 221:11 223:2,10 225:21 236:7 284:21	<b>sold</b> 160:6 163:19 222:23	
<b>significant</b> 24:8 79:10 135:4,14,16 135:16,18 138:16 164:14 175:9 282:16 292:17 294:22 295:10		<b>solely</b> 92:24 287:9	
<b>significantly</b> 193:20,23		<b>solicitation</b> 55:17 298:6	
<b>signs</b> 264:12		<b>solicitor</b> 10:10	
<b>similar</b> 54:11 82:17 89:2 179:22 188:11		<b>solutions</b> 17:5 299:21	<b>sort</b> 25:6 29:25 149:7 173:9 189:19,23 191:1 193:6 202:24 207:23 225:16,17 275:21 286:21
<b>similarly</b> 216:18 264:13		<b>solvency</b> 132:5 133:7,23 134:17 159:2	
<b>simmons</b> 16:19 289:5	<b>six</b> 65:4 74:10 84:3 94:13 269:3	<b>solvent</b> 134:2,18 134:23 195:6 211:11,13,13 234:12 235:4,8,16 236:3,10	<b>sorts</b> 146:10
<b>simple</b> 32:19 41:7 41:14 185:13 213:18 223:21 259:13	<b>sixth</b> 120:9 265:4	<b>somebody</b> 25:8 77:17 78:3 178:1 198:4 200:12	<b>sounds</b> 74:24
<b>simply</b> 160:8 163:10 211:23 224:3 240:10 247:25 259:1 268:19 272:25 282:8	<b>size</b> 74:17 75:1	<b>someone's</b> 183:23	<b>source</b> 80:23 233:24
<b>singh</b> 8:9 166:8,8 166:13,22,25	<b>skeptical</b> 285:6	<b>somewhat</b> 209:2 285:5	<b>sources</b> 87:1 138:8,9,10
	<b>skip</b> 129:10 142:15	<b>sonia</b> 14:7	<b>south</b> 11:3 45:24 46:5,13
	<b>sledding</b> 30:5	<b>soon</b> 141:6 145:9 145:18 158:9 202:18 206:18 212:17 236:23 247:1	<b>southern</b> 1:3 10:3 275:10
	<b>sleeves</b> 176:10		<b>spahr</b> 12:9 48:10
	<b>slide</b> 139:9 151:10 153:3	<b>sooner</b> 206:3 291:5	<b>speak</b> 44:23 222:15
	<b>slight</b> 280:19		<b>speaker</b> 214:4,15 214:17 295:21
			<b>speaking</b> 173:16 223:1 248:10 249:7 264:10
			<b>speaks</b> 66:21

[special - suggested]

Page 56

<b>special</b> 249:15	<b>started</b> 266:1	<b>stood</b> 229:7	<b>subsection</b> 106:24
<b>specific</b> 112:2	<b>starting</b> 77:7	<b>stop</b> 46:11 162:22	<b>subsections</b>
154:2 161:8	86:16 87:4 107:8	174:3 246:21	272:20
238:15,16 247:5	148:1 154:22	255:10 258:16	<b>substantial</b> 111:5
256:3 277:19	176:20 261:23	<b>stopping</b> 30:2	111:5,6 115:15
<b>specifically</b> 25:8	<b>starts</b> 94:13 180:4	<b>store</b> 162:24	184:21 185:21
66:21 91:8 96:21	<b>state</b> 44:24 52:19	<b>straight</b> 27:22	205:21 295:11
100:22 110:6	52:19 62:15 74:1	54:7	<b>substantially</b>
199:22 202:1	84:4 97:18 99:14	<b>strauss</b> 9:1	85:22 194:21
274:12	146:9 289:1,5	<b>street</b> 1:17 9:14	222:23
<b>specified</b> 68:4,15	<b>stated</b> 54:12 86:12	10:4,19 12:3,11	<b>substantive</b>
152:22 156:3	123:14	15:3,12 16:21	151:18,18 154:7
<b>speculating</b> 69:10	<b>statement</b> 36:20	19:4	154:15,17 204:11
69:12 70:3 72:16	94:17 114:4,15	<b>strike</b> 75:12 84:2	235:25 236:1
73:5	122:19 132:9,14	98:18 129:20	291:18 293:11,17
<b>speculation</b> 95:5	132:16,18,19,25	<b>striking</b> 29:24	293:23 294:1
<b>speculative</b>	133:9,12,14,15	<b>strong</b> 17:3	<b>substitution</b>
139:18 164:10	134:8 136:8	202:23 213:2	195:20
<b>speed</b> 232:17	141:21 165:10	<b>struck</b> 28:16	<b>subtract</b> 106:11
<b>spend</b> 45:2 96:18	204:5,9 205:1	190:16	<b>subtracting</b>
180:6	220:15 234:21	<b>structure</b> 207:16	130:19
<b>spent</b> 24:8 118:23	235:3 266:12	<b>struggling</b> 178:11	<b>subtracts</b> 106:1
217:10 266:3	<b>statements</b> 42:13	<b>stuff</b> 188:8	<b>succeed</b> 215:16
271:2	42:16 48:11	<b>subcommittee</b>	<b>succeeding</b>
<b>split</b> 67:2	188:20	148:8	287:12
<b>spoke</b> 202:17	<b>states</b> 1:2,16 9:12	<b>subcon</b> 207:16	<b>success</b> 186:9
<b>st</b> 19:19	10:2 46:4 52:17	<b>subject</b> 22:23 47:1	212:13
<b>staff</b> 25:17	91:20 103:20	68:8 110:18	<b>successful</b> 195:14
<b>stage</b> 239:1 249:6	208:14	111:16 167:3,6	<b>successfully</b>
<b>stand</b> 56:7 60:14	<b>stating</b> 134:23	172:1,2 195:7	266:20
111:23 186:21	<b>status</b> 199:2 218:5	203:22 225:9	<b>sue</b> 250:4 273:16
187:13 289:24	289:10	249:1 250:20	<b>sued</b> 42:24 226:6
<b>standard</b> 151:9	<b>stay</b> 52:15,22	<b>submit</b> 29:14 42:5	226:9,12 236:17
<b>standards</b> 138:22	54:18 158:9	78:23,24 138:2	287:3
139:7 155:20	217:17 218:20	213:20 214:3	<b>sufficient</b> 31:24
195:11	<b>steen</b> 13:1	228:3 239:19	79:7 93:1 143:24
<b>standing</b> 148:19	<b>steering</b> 173:9	243:18 244:5	197:3 282:2
150:19 159:9	<b>step</b> 59:14 85:11	251:21 257:11	<b>suggest</b> 24:13
244:15,18,23	89:25 136:18	<b>submitted</b> 56:24	146:25 245:15
<b>standpoint</b> 188:6	<b>stick</b> 248:15	59:20 60:8,22	277:17
<b>stands</b> 289:18	<b>stipulation</b> 21:14	61:5,22 90:3,11	<b>suggested</b> 147:11
<b>start</b> 20:12 94:1	22:19 24:17 46:6	205:19 213:23	287:18 295:17
262:1	49:2 212:1	298:9,12,15	



<b>suggesting</b> 32:23 218:10 246:3 <b>suggestion</b> 29:17 149:11 <b>suite</b> 8:16 9:15 12:4 15:4,22 16:22 19:20 299:23 <b>sum</b> 287:25 <b>summarize</b> 98:4 99:18,21 <b>summarized</b> 100:5 <b>summarizing</b> 100:15 <b>summary</b> 165:2 249:7,20 250:19 250:21 <b>summer</b> 155:13 <b>sunny</b> 8:9 166:8 219:8 235:13 <b>super</b> 208:20 <b>superior</b> 209:14 209:18 <b>superpriority</b> 212:5,6 234:18 <b>superseding</b> 264:14 265:3 <b>supplement</b> 57:15 141:24 <b>supplemental</b> 5:5 5:16,24 6:1,3,7 60:10,24 83:15,21 83:25 198:9 298:14 <b>suppliers</b> 243:16 <b>supply</b> 284:22 <b>support</b> 4:2 23:2 23:22 28:11,14,19 30:21 42:4 139:8 155:9,13 172:14 182:7 186:21 249:23 295:9	<b>supporting</b> 20:21 <b>supportive</b> 251:8 251:10 <b>supports</b> 172:21 247:22 <b>suppose</b> 181:24 290:12 <b>supposed</b> 39:21 124:2 127:14 222:14 238:12 <b>sure</b> 25:8 26:17 33:10,13 36:25 46:12,16 51:13 61:20 64:25 70:13 88:19 92:4,11 94:13 109:9 120:16 130:15 132:7 139:10 141:12 144:16 145:12 147:16 149:4 160:16 167:16 172:23 174:4,5 178:2 198:14 203:22 214:4,18 228:25 234:23 245:2 246:12 248:6 249:23 267:14 273:12 276:24 289:9,19 290:22 294:13 <b>surety</b> 45:18 <b>surplus</b> 132:10,16 132:17,17 <b>surprise</b> 30:11 228:14,16 <b>surprised</b> 158:15 <b>surprising</b> 228:25 <b>surviving</b> 130:16 <b>suspended</b> 165:15 <b>sweetheart</b> 281:2 <b>swing</b> 253:4	<b>swords</b> 172:14 <b>sworn</b> 56:11 60:18 90:7 <b>system</b> 98:22 99:2 99:11 <b>systems</b> 98:11,14 98:24,24	190:4 223:5 244:22 268:13 <b>takes</b> 37:10 38:9 98:4 253:4 <b>talk</b> 64:8 85:2 149:18,18 151:8 155:14 158:12 175:9 187:20 197:14 221:15 236:12 238:18 246:4 251:7 290:21 295:16 <b>talked</b> 74:20 121:18 144:7 152:13 163:25 192:20 202:17 <b>talking</b> 32:8,8 100:11,12 113:24 116:15 117:9 118:12 122:7 131:9 151:11 156:6 165:9 176:10 194:17 219:3 222:22 225:6 231:1,6,11 238:14,15,22 239:8,12 240:2 243:25 248:19 252:23,24,24 253:2,12,17,23,25 255:5 258:18 259:12,22 260:8 262:4 264:4,18 278:10 279:23 285:21 288:6,11 293:22 <b>talks</b> 63:4 103:17 105:23 119:9 198:17 275:25 <b>tannor</b> 2:15 18:9 150:11,22 <b>tannor's</b> 150:25
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

190:4 223:5  
244:22 268:13  
**takes** 37:10 38:9  
98:4 253:4  
**talk** 64:8 85:2  
149:18,18 151:8  
155:14 158:12  
175:9 187:20  
197:14 221:15  
236:12 238:18  
246:4 251:7  
290:21 295:16  
**talked** 74:20  
121:18 144:7  
152:13 163:25  
192:20 202:17  
**talking** 32:8,8  
100:11,12 113:24  
116:15 117:9  
118:12 122:7  
131:9 151:11  
156:6 165:9  
176:10 194:17  
219:3 222:22  
225:6 231:1,6,11  
238:14,15,22  
239:8,12 240:2  
243:25 248:19  
252:23,24,24  
253:2,12,17,23,25  
255:5 258:18  
259:12,22 260:8  
262:4 264:4,18  
278:10 279:23  
285:21 288:6,11  
293:22  
**talks** 63:4 103:17  
105:23 119:9  
198:17 275:25  
**tannor** 2:15 18:9  
150:11,22  
**tannor's** 150:25

<b>tarter</b> 18:1	209:1 233:21	277:16,25 298:10	281:9 282:23
<b>tautological</b>	<b>terminated</b> 77:17	298:13,16	<b>think</b> 20:5 23:7
147:20	<b>termination</b> 21:9	<b>tex</b> 275:14	28:2,5 30:10,15
<b>tautology</b> 96:16	24:15 77:10,13,17	<b>texas</b> 275:10	30:19 32:15 33:24
<b>tax</b> 126:5,9,14	77:20,22 78:3,8	<b>thank</b> 24:20,21	34:2,11,23 42:2
275:25	78:23,25 152:25	25:25 27:11,13	42:24 46:19 47:24
<b>team</b> 4:25 13:18	207:15 224:11	33:14 35:2 44:13	49:18,19 50:12
160:3	<b>terms</b> 21:7 26:3	48:15,16 51:16	51:23 52:12,25
<b>technically</b> 22:19	27:19 28:10,13	52:4 53:8,9 59:11	53:13 54:6 55:3
<b>teed</b> 28:14 29:14	43:23 45:21 47:4	59:14,15 60:4	58:20 59:2 64:2
<b>teeth</b> 200:9	82:17 140:4	63:14 79:2 85:7	64:16 65:5 66:22
<b>telephone</b> 276:22	144:14 152:12	86:10,23 88:15,16	67:14 68:17,22
<b>telephonic</b> 199:1	155:23 158:17	89:22 90:1 109:20	69:25 70:19 71:12
<b>telephonically</b>	162:21 173:4	110:8 126:18	72:24 73:17,20
12:7,15,16 13:23	175:12 186:18	136:2 151:3 203:8	80:2,20 83:18,18
14:7,23 15:25	188:6 190:9,11,12	207:1 208:6,7	85:2 109:12
16:25 18:6 19:8	196:2 213:10	212:22 214:18	114:15 115:12,21
19:23 288:25	241:22 249:21	219:6,7,25 271:18	116:21 117:8
<b>teligent</b> 180:19,23	<b>test</b> 205:3 248:10	276:20 283:4	128:2 129:17
184:9	<b>tested</b> 164:8	288:19 290:2	132:4 137:6
<b>tell</b> 36:15 41:14	<b>testified</b> 138:9	<b>thanks</b> 27:14	138:13,17 140:6,9
42:17 45:6 58:3	259:3	44:14 55:19 203:9	144:10,13 145:10
70:13 71:7 93:16	<b>testify</b> 196:6	206:25	145:18 146:13
113:22 120:14	<b>testimony</b> 55:15	<b>theory</b> 193:19	152:6 153:3 155:2
129:14 137:8	56:16,21,24 60:22	199:25	155:20 156:14,21
166:2 220:6,9	61:1,5 64:16 71:2	<b>thing</b> 33:9 42:14	157:6,8,24 158:5
226:22 227:7	71:13 72:3,5,17	52:14 140:7 171:3	162:7,12 164:1,9
240:20 246:17	86:13 89:1,18	172:24 196:19	164:14 165:13
254:11,18 284:10	90:11,14,20	197:8 217:25	167:1 168:13
287:21	103:11 104:24	243:13 244:4	169:23,23 170:21
<b>telling</b> 41:11	109:17 113:9,11	249:17 251:11,13	171:22 172:6,16
134:1 218:19	114:8 138:5,14,17	271:7	172:22 173:2,13
229:2 246:1 264:6	138:18 139:8,16	<b>things</b> 29:6 35:16	174:9,13 175:5,8
<b>tells</b> 283:20	139:19 151:22	42:3,25 62:17	175:24 178:18
<b>ten</b> 118:23 167:19	155:1 164:12	86:17 97:18	179:23 180:8
196:1 217:10	168:21 170:13	146:10,16 187:19	181:15,22,25
<b>tenants</b> 139:24	209:25 233:17	195:23 197:1	182:5,14 183:3
<b>tend</b> 277:3	237:2 238:19	199:2,6 201:13	184:19 185:1,20
<b>tens</b> 98:3 118:13	239:1,2,20 246:14	203:19,24 204:13	186:7,10,17
<b>tentative</b> 79:15	251:22 252:23	206:6 211:9	187:10,11,18
<b>tenth</b> 39:2	253:10,12,25	216:10 220:6,7,23	188:5 189:9,14
<b>term</b> 36:6 66:2	257:14 258:8	223:15 229:13	190:13,24 191:8
145:15 150:24	270:24 277:5,10	245:1 280:21	191:18 193:1,5,9

[think - transferred]

Page 59

197:8 198:12 202:24 203:7 204:15 205:19 206:19 207:24,24 207:25 210:3 212:14 216:24 219:2 220:2,14,23 223:15 224:3 226:1,1,8,8 229:4 231:19 232:25 233:6 235:14,15 238:12,21,22 239:3,11 240:15 242:18,22 243:1 245:7 248:7 252:14 253:4 256:9 257:13,20 258:7 262:14 267:18 270:11,21 271:11,13,25 272:2 273:13 275:12,13,18 276:10,17 277:10 278:3 279:6,10 280:8,21 283:5 288:17 290:14 291:1,7 292:1,3,6 293:20 294:20 295:18 296:5 <b>thinking</b> 95:6 150:7 258:2 <b>third</b> 11:18 13:12 33:18 34:25 51:2 59:6 120:9 146:5 178:10,11 247:18 295:5 <b>thirty</b> 269:3 <b>thomas</b> 13:6 16:15 <b>thought</b> 27:24 67:16 88:25 89:17 118:24 133:8 146:25 174:11	178:5 192:12 196:13 201:13 286:18 <b>thousand</b> 269:11 <b>thousands</b> 246:20 249:11 <b>three</b> 19:3 35:8 55:24,24 57:8 70:2,3 72:20 97:17 99:18,23 116:20 124:6,8 159:25 168:4 173:6 180:17 187:5 189:14 215:10 235:24 237:2 240:10 241:10,21 266:17 286:2 <b>throwing</b> 216:10 <b>tiering</b> 29:6 <b>time</b> 20:22 24:8 27:24 42:3 54:7 58:10 84:6 90:2 94:6,9,18,21 96:8 96:15,18 99:14,22 129:6 133:23 137:3 143:14 145:22 146:13 152:13 156:18 180:7 184:2 185:8 187:22 189:14 190:1,23 192:22 197:2 203:16 206:23 210:25 215:6 228:8,20 238:3 240:10 246:18,22 247:5 279:2,18 281:10 283:19 286:16 290:10,21 <b>timely</b> 177:5 <b>times</b> 67:15 97:20 207:12	<b>timing</b> 82:4 86:11 171:17 182:24 183:4 188:5 221:12 <b>tired</b> 295:21 <b>today</b> 27:8 29:11 29:15,18 32:9 34:5 35:8 37:15 38:20 40:18,19,23 40:25 41:24 43:21 49:8 51:22 56:17 60:25 63:7 64:1 64:13 65:16,22 66:3,11 67:7 69:7 73:3 75:10 90:13 111:20,23 113:16 113:25 114:19 122:21,25 130:6 135:1,8,9,11,17 141:14 155:8 171:21 187:13 188:21,24 189:2 189:11 192:16 193:7 196:7 202:13,17 204:7 208:14 220:10 230:2,23 242:25 244:25 285:21,22 287:23 288:3 289:23 <b>today's</b> 286:10 <b>todd</b> 15:25 <b>toe</b> 171:21 <b>toggle</b> 207:16 <b>togut</b> 18:8 150:22 <b>told</b> 214:1,1 227:8 227:19,25 228:9 228:11 250:14 258:4 260:8 <b>tom</b> 288:24 <b>tomorrow</b> 163:15 261:9	<b>ton</b> 188:22 <b>tons</b> 76:16 <b>tooth</b> 241:10 <b>top</b> 68:16 130:13 134:20 198:11 221:13 222:14 254:9 263:4 269:14 270:4 <b>topics</b> 82:21 154:4 <b>total</b> 64:9 87:11 97:23 102:19 119:20 130:16 199:7 <b>totaling</b> 71:4 261:20 267:9 <b>totality</b> 54:1 <b>tough</b> 30:5 <b>toys</b> 179:23 180:18 188:11 <b>track</b> 258:24 <b>tracked</b> 99:24 <b>tracker</b> 133:7 <b>tracking</b> 73:14,18 99:23 144:23 <b>traction</b> 173:10 <b>trade</b> 41:14 283:7 283:11,13 287:23 288:3 <b>traders</b> 35:22 242:7 <b>trafficking</b> 274:5 <b>transaction</b> 116:13 149:17 <b>transactions</b> 146:9 <b>transcribed</b> 7:24 <b>transcriber</b> 299:13 <b>transcript</b> 299:4 <b>transcripts</b> 190:6 <b>transferred</b> 22:2 272:15 274:2
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p><b>transfers</b> 69:18 146:10 250:16,20 250:22 <b>transform</b> 3:25 4:4,23 5:8,11 42:21 46:25 47:1 66:8,12,14,17,19 66:24 67:1,3,6,8,8 67:11,12,22 68:8 68:14,23 69:5 81:3 110:14 111:2 111:21 112:9,24 113:6,13 114:18 116:13 129:15,15 129:17,20 135:15 152:1 166:15 169:23 170:10 171:8 195:12,19 197:4 204:4 251:3 257:20 284:22 288:16 <b>transform's</b> 69:2 112:17 113:3,17 113:25 114:6 128:24 288:17 <b>transformed</b> 99:17 249:17 <b>transforms</b> 107:2 <b>transier</b> 56:1,6,14 56:23 57:1,7,10 59:13,16 62:8 76:10 138:5 140:22 297:6 298:8 <b>transit</b> 165:8 166:9 168:6,11 169:24 170:9 255:7 278:4,5 <b>transitioning</b> 200:19 <b>treat</b> 47:24 278:17 <b>treated</b> 23:12 48:4 161:20 174:8</p>	<p>197:21 276:7 280:2,20 <b>treatment</b> 33:9,22 41:4 177:25 178:14,16 <b>treatments</b> 181:3 <b>trial</b> 228:21 <b>trials</b> 71:21 <b>tribunal</b> 215:4 <b>tried</b> 27:7 138:17 151:23 273:17 <b>troubled</b> 163:5 222:6,16 <b>true</b> 68:23 83:9 84:22 112:16,22 113:8,16 117:23 118:20 123:6 124:7 158:23 201:18,20,21 209:20 299:5 <b>trust</b> 4:10 5:5 17:16 22:2 25:7 25:18 57:11,18,21 58:1,4,22 59:25 60:5 61:10 62:9 70:22 90:19 93:14 116:25 122:14 141:3 142:1 148:15 152:19 154:19 204:23 215:15,17 218:15 223:23 224:2 226:20 227:1 240:25 272:15 273:20,22,25 291:13 298:18 <b>trustee</b> 4:11 9:12 17:17 27:23 185:6 231:21 232:4,8,17 232:18,19 233:22 234:2,6 235:1 236:7 237:25 240:15,21 241:4</p>	<p>242:12,13,16,18 242:20 291:14 295:18,24 296:9 <b>trustee's</b> 31:6 37:3 243:18 271:21 <b>trustees</b> 236:16 <b>try</b> 24:9 38:1 137:21 167:12 175:1,19 188:15 191:20,21 192:6 273:19 295:22 <b>trying</b> 29:22 30:12 71:11 80:11 80:25 127:18,19 155:23 173:7 185:25 187:18 202:25 218:13 227:14,16 241:24 266:2 279:6 <b>tuesday</b> 141:17 <b>tune</b> 211:14 <b>turn</b> 55:20 62:14 67:19 69:16 73:6 77:6 81:8 99:8 100:23 103:16 119:8 121:17 124:9 126:19 136:7 187:24 198:10 248:11 <b>turned</b> 24:12 <b>twelve</b> 57:23 <b>twentieth</b> 5:2 11:9 <b>twenty</b> 70:8 80:24 <b>twice</b> 37:16 <b>two</b> 31:21 35:13 35:21 37:2 41:19 41:21 42:3 50:4 50:19 52:2 58:21 60:8,22 70:3 72:15 103:12 104:25 105:9 116:20 122:9</p>	<p>125:1 156:20,21 181:3 183:4 215:10,10 220:23 222:18 239:22 241:21 242:5 246:22 248:19 250:14 251:1 253:14 259:7 271:24 284:15 <b>tx</b> 8:17 <b>type</b> 68:10 82:10 125:15 126:9 156:2 181:23 224:10 229:8,25 265:2 <b>types</b> 31:21 117:12 146:16 203:22 280:21 <b>typical</b> 25:2,9</p>
<b>u</b>			
<p><b>u</b> 90:8 297:14 <b>u.s.</b> 1:25 9:11,13 10:1,9 27:23 31:6 37:3 157:21 185:6 208:15 243:18 271:21 <b>ucc</b> 58:6,22 <b>uh</b> 146:15,18 149:9 156:24 165:6 178:13 182:9 183:19 273:11 <b>ultimate</b> 75:1 82:5 175:16 250:9 <b>ultimately</b> 73:2 108:13 157:18 173:11 178:16 185:5 188:4 190:10 193:9,20 193:21 195:8 197:6,10 202:11 204:24,24 207:21 286:1</p>			

<p><b>unable</b> 113:13  <b>unanimity</b> 241:18  <b>unanimously</b> 201:4  <b>uncertain</b> 211:10  <b>unclear</b> 69:8 235:21  <b>uncontested</b> 20:17  <b>uncontroverted</b> 138:19 139:7,19 248:22  <b>undeniable</b> 159:13  <b>underestimate</b> 197:13  <b>underlying</b> 27:5 33:25 52:19 210:24 225:18  <b>understand</b> 33:17 52:12 56:20 62:16 66:22 71:12 76:15 85:21 88:4,8 92:4 101:10 109:9,10 109:10 112:13 123:9 126:20 127:18,20 145:25 161:19 170:5 171:10,19 174:5 178:24 189:4 196:21 202:20 210:7 218:17 219:1,4 220:20 236:9 237:18 238:10 243:17 247:21 251:5 252:6 253:1,24 262:23 264:19 271:17 272:11,17 273:25 279:19 282:7 284:14 285:7,9 288:6 290:3,8</p>	<p><b>understanding</b> 50:1 58:5 61:21 72:23 76:10 77:14 78:14 82:9 95:14 97:3 101:13 112:4 117:1 122:15 123:3 126:22 188:24 200:16 221:25 222:2  <b>understood</b> 46:18 158:10 290:2  <b>undertook</b> 164:5  <b>undisputed</b> 39:12 41:6 138:3 155:1 220:19 223:17 233:22  <b>unduly</b> 27:4 248:12  <b>unfair</b> 243:14,18  <b>unfairness</b> 154:17  <b>unfortunately</b> 202:13  <b>unhappy</b> 273:18  <b>unidentified</b> 214:4,15,17 295:21  <b>unique</b> 193:13 209:20  <b>unit</b> 5:16 11:17 15:2 49:23  <b>united</b> 1:2,16 9:12 10:2 91:20 208:14  <b>universe</b> 240:8  <b>unknown</b> 194:5 269:10  <b>unnecessary</b> 94:10  <b>unorthodox</b> 203:21  <b>unreasonable</b> 246:2 248:12  <b>unrefuted</b> 138:6 186:10</p>	<p><b>unresolved</b> 95:8  <b>unrestricted</b> 63:5 63:8  <b>unsecured</b> 9:2 21:24 22:3,13,23 28:15 101:9,20 116:3,9,16 119:14 119:23 152:16,17 153:8,10 154:24 204:17 207:7 241:2,5 273:19 277:9 278:14,17 292:4,8,16 294:23 295:2,11  <b>unsecureds</b> 195:16  <b>unusual</b> 209:2,24  <b>updated</b> 43:9  <b>upfront</b> 28:2 31:11  <b>upside</b> 173:14  <b>upwards</b> 206:8 207:8  <b>urge</b> 216:23,24 285:24  <b>usa</b> 5:22 19:2  <b>use</b> 130:14 134:3 200:20 239:21  <b>uses</b> 128:15 138:10,13  <b>ust's</b> 2:19  <b>usually</b> 72:19 225:21 249:8  <b>utilize</b> 100:3</p>	<p><b>valuable</b> 140:13 164:10  <b>value</b> 30:7 214:2 215:22  <b>valueless</b> 210:6  <b>variable</b> 79:24  <b>variance</b> 199:4  <b>varick</b> 9:14  <b>varies</b> 38:16  <b>various</b> 43:9 87:1 155:20 199:6 251:23  <b>vedder</b> 18:15  <b>vehicle</b> 4:13  <b>vendor</b> 35:10,12 36:1 81:16,22 84:12,23 95:17 108:2,15,20 109:4 120:20 186:25 222:4 224:5 254:20  <b>vendors</b> 36:1,3,7 95:3 96:1,9 108:7 108:14 109:13 120:6,12,20,21,23 121:3 131:8 187:21 220:11 222:2,5,8,10,13 229:22,23 230:17 243:15 252:1 255:8 258:21 262:21 267:5 283:11,13,25,25 284:9,22 285:15 285:17  <b>verge</b> 285:18  <b>veritext</b> 299:21  <b>versa</b> 169:14  <b>version</b> 21:3  <b>versus</b> 82:5 95:15 167:6 192:16 194:12 241:10,21 294:3</p>
		<p><b>v</b></p>	
		<p><b>v</b> 199:15  <b>vacate</b> 228:6 230:3  <b>vacated</b> 229:14  <b>vague</b> 277:10  <b>valid</b> 210:3 264:12</p>	

<b>vested</b> 22:6 24:18	<b>waivable</b> 144:7	133:2,5,11,17	258:19,23 259:6
<b>vice</b> 169:13	<b>waived</b> 22:5	134:15 135:22	259:12,18,21
<b>victims</b> 286:13	142:14 289:2,6	158:19 174:20	260:4,7,10,14,19
<b>vietnam</b> 17:7	<b>waiver</b> 153:1	188:18 189:13	261:3,14,18,23
283:15	176:14	190:13 192:3	262:1,4,7,9,11,16
<b>view</b> 88:9 119:13	<b>walk</b> 27:20 86:17	219:23 220:21	262:20,25 263:3,7
189:12 196:23	129:2 189:8	221:1,15,18,21,24	263:11,14,17,20
198:3 288:14	295:14	223:8,10 224:8,18	263:23 264:4,15
<b>views</b> 293:19	<b>walked</b> 155:19	224:23 225:2,13	264:21,23 265:1,5
<b>village</b> 18:16	192:18	226:4,7,15,17,23	265:8,10,16,21,24
50:18 51:2,21	<b>walking</b> 126:22	227:7,11,14,16,21	266:5,8,17,22,24
<b>violates</b> 40:25	<b>walks</b> 171:5	227:25 228:8,12	267:2,5,7,14,18
<b>violating</b> 276:1	<b>wall</b> 15:12	228:18,22,25	267:21,24 268:3,6
<b>violations</b> 52:9	<b>wallender</b> 140:24	229:12,19,25	268:10,16,19,21
<b>virtually</b> 192:10	<b>walsh</b> 19:1	230:7,9,14,16,20	268:24 269:1,3,9
<b>visionary</b> 239:14	<b>wander</b> 13:15	230:22 231:2,6,11	269:14,18,22
239:17 248:12	35:5,7,7 36:15,18	231:14,17 232:4	270:1,5,23 271:4
249:21	36:21,25 37:2,18	233:3,6,14,16,21	271:5,13,16,18
<b>voice</b> 149:4	38:5,9,12,15,23	234:1,7,9,14,19	277:4 283:12
<b>void</b> 228:23	38:25 39:6,11,16	235:10 236:7,22	287:18 295:16
<b>volume</b> 100:10,15	39:20 40:8,11,13	237:1,7,13,21,23	296:2 297:6,7,9
<b>voluntary</b> 29:5	40:16,19,21 41:2	238:2,4,10,18	297:11
206:4	41:5,17,22,25	239:7,10,13,18	<b>want</b> 28:2,23
<b>vote</b> 149:11,12	42:2,14,17,23	240:15,20 241:8	31:17 34:9 35:16
152:24 294:3	43:18 44:1,13	241:13,16,20,24	38:18,19 40:5
<b>votes</b> 55:17	57:2,6,7 58:16	242:4,13,16,24	42:19 45:2 52:2
241:10 294:24	59:11 62:4,5	243:6,10,24 244:2	56:25 61:11,20
298:7	63:18,21 67:18	244:4,10,12,17,21	67:5 70:9 79:3
<b>voting</b> 291:22,23	71:13,14,18 72:10	244:24 245:7,14	81:7 83:15 85:8
294:4,11 295:4	75:12,13 76:8,24	245:17,22,24	86:15 93:7 94:12
<b>vu</b> 118:22	77:4,5 79:2 83:4	246:5,8,12,17	102:7 123:18
<b>w</b>	83:20,24 85:4,7	247:11,16,21,25	132:24,25 136:10
<b>wacker</b> 2:13 11:3	88:18,21 89:6,8	248:3,6,8 249:23	136:23 139:15
45:24 46:5,13	89:17,22 93:10,11	250:11,13,18,21	140:16 144:14,16
<b>wait</b> 38:19,21	96:17,19,24 99:6	251:4,7,11,16,21	144:17 145:9,18
39:21 40:4,5	99:7 101:22,24,25	252:17,20,23	147:5,6 156:7
183:9,11 203:25	104:23 105:19,21	253:12,23,25	159:15 164:13,16
206:3 232:22	106:21,22 107:23	254:8,11,13,15,17	172:15 174:5
266:1 286:2	110:10,13 112:21	254:20 255:4,14	175:10 177:8
<b>waited</b> 280:3	112:23 113:5,15	255:16,18,20,24	178:25 180:14
<b>waiting</b> 20:3	116:6,14 118:24	256:1,6,15,18,19	182:12 189:8
145:21	119:4,7 124:13	256:21,25 257:3	193:12 200:8
	126:1,12 132:23	257:11 258:7,13	203:17,19 204:13

[want - work]

Page 63

207:21 208:25	247:20 258:8	<b>went</b> 109:2 117:18	151:2
213:9 217:17	282:3 284:8 285:5	151:23 163:25	<b>withdrawing</b> 50:2
219:25 222:7	288:2 292:24	192:25 193:3	52:4,4,6
223:13 240:17	<b>ways</b> 37:2 158:1	194:25 196:20	<b>witness</b> 55:4
242:22 245:3,4	<b>we've</b> 22:10,20	201:24 203:18	56:11,13,19,22
259:9 262:20	23:5 28:16 30:12	260:4 269:6	58:15 59:15 60:18
271:24 275:8	45:25 47:9 48:20	273:17 275:18	60:20 61:2 67:16
279:19 281:24	65:6,25 67:16	<b>west</b> 15:3 19:19	72:6 79:13,22
283:4 288:8,9,22	71:24,25 72:6	<b>westfield</b> 12:5	80:2,14,17,20
291:16,21 295:16	79:15 84:16 100:2	<b>white</b> 1:18	81:1,24 82:6,9,13
295:17 296:2,5,10	120:21 132:7	<b>whitebox</b> 4:8	82:23 83:2 90:1,7
<b>wanted</b> 20:4	138:1 140:4 144:7	53:21,24 187:6	90:9,15 104:2,11
46:20 51:13 52:14	153:25 155:4,19	<b>who've</b> 249:25	104:13,17,21
145:8 147:14,16	156:11 158:22	<b>wholeheartedly</b>	105:5,13,17
150:23 167:15	170:1 171:7 180:9	205:25	107:22 109:8,16
170:8 172:18,22	186:7,8,12 187:12	<b>wholly</b> 138:6	109:20,24 110:2,8
172:25 178:2	187:14 189:3	<b>william</b> 7:25	113:13 116:11
186:21 191:3	196:14 202:16,17	20:21 56:12,23	123:25 124:17,21
192:24 195:23,24	203:15 204:2	90:3,8 140:22	124:25 125:3,7,15
277:3 289:1,5	206:6 208:22	297:6,10,11,12	125:21 126:7
<b>wanting</b> 165:23	211:3 212:12	298:8 299:4,17	134:13 215:22
200:24	213:24 235:19	<b>willing</b> 42:22 65:4	297:5
<b>wants</b> 39:17	258:1 271:2	82:14 183:11	<b>witnesses</b> 55:24
187:20 207:20	288:20 296:7	245:20	55:25 124:6
225:22	<b>wedge</b> 191:10	<b>wilmington</b> 4:10	224:12 237:2
<b>warranted</b> 287:9	<b>week</b> 35:16 51:24	5:5 12:13 17:16	246:14 251:24
288:14	77:23 78:9 102:14	59:25 60:5 61:10	257:14 258:10
<b>washington</b> 10:13	102:14,14 143:13	90:19 291:13	<b>wollmuth</b> 19:10
10:20 19:19 292:7	143:14 144:25	298:18	<b>won</b> 241:9
<b>waste</b> 152:8	223:5 224:9 243:4	<b>wilson</b> 10:22	<b>wondering</b> 163:16
<b>watching</b> 191:2	283:19 295:20	<b>win</b> 257:17 260:24	<b>word</b> 120:17
<b>water</b> 114:11,13	<b>weekly</b> 99:20	<b>wind</b> 159:6 186:4	128:15 129:20
<b>waterfall</b> 222:15	199:6	<b>winddown</b> 30:9	235:24 239:21
<b>wax</b> 249:4	<b>weeks</b> 103:12	<b>window</b> 198:3	254:25
<b>way</b> 29:23 30:3	105:1,9 259:7	<b>winners</b> 2:17 16:2	<b>words</b> 168:20
37:3 43:24 50:12	<b>weigh</b> 199:13	212:24 213:1,13	186:22 277:24
85:1 95:23 108:19	<b>weihai</b> 3:7 6:21	213:21 215:16	<b>work</b> 26:2 99:17
109:2,3 140:4	15:19 288:25	217:14	138:16 143:15
142:24 144:4	<b>weil</b> 8:2,13 20:7	<b>winning</b> 252:6	144:9 163:10
147:11 178:7,17	27:16 44:15 50:9	<b>wish</b> 55:8 56:18	174:13 176:4,23
189:19 190:9	55:23 123:12	61:1,7 90:13,16	186:12 191:20
210:5 218:20	137:18 175:21	<b>withdraw</b> 23:1	192:20,22 198:14
225:2 235:8 242:2	192:10 290:9	50:5,23 150:14	199:17 206:10

[work - zimmerman]

Page 64

212:1,20 221:9 243:8 283:5 <b>worked</b> 40:3 59:24 142:25 143:1 192:11 202:21 207:18 <b>working</b> 24:8 80:6 85:25 149:7 175:24 206:19 220:1 286:10 <b>works</b> 77:13 181:8 225:11 232:13 <b>world</b> 84:16,20,22 95:8,11,22 107:11 107:17 108:1,10 108:18 109:19 110:4,6 118:2 193:15,16,17 198:7 236:18 242:8 243:1 252:8 284:9 <b>world's</b> 3:21 <b>worldwide</b> 4:25 13:18 <b>worried</b> 229:5,6 <b>worse</b> 135:11,12 135:13 187:24 194:10 <b>worth</b> 28:5 34:17 212:10 273:13 <b>wouldn't</b> 143:14 196:6 <b>wraps</b> 54:4 <b>write</b> 26:13 278:16 <b>written</b> 169:12 225:15 <b>wrong</b> 39:23 40:15 124:24 224:6 225:12 226:14,18 231:14 231:17 235:24	238:13,15,17 <b>wrote</b> 42:19 <b>ww</b> 48:25 <b>x</b> <b>x</b> 1:6,14 65:3 247:13 297:1 298:1,3 <b>xx</b> 53:20 <b>y</b> <b>y</b> 90:8 247:14 297:3 <b>yeah</b> 48:4 49:19 52:24 55:3 61:16 67:16 76:20 80:20 91:7 124:17 146:24 147:4 154:9 163:9,22 165:1,4,12 166:3 167:9,17 168:2 169:5,14 171:11 171:20 174:10,24 175:8 178:9 180:24 181:1 182:14 183:15,22 185:1 201:21 214:23 244:4 254:11 262:7 271:15 278:21 290:11 <b>year</b> 41:19 70:6 74:5 80:9 97:11 128:12 204:3 <b>years</b> 50:25 71:11 72:12,14,20 75:7 97:3 98:15 99:1 117:23 118:10,15 231:23 238:22,24 240:2,3,5,7,10 247:23 257:13 286:2 <b>yep</b> 259:12 <b>yesterday</b> 42:20 49:10 119:1	201:14 202:18 209:7 246:6 <b>yoo</b> 15:18 <b>york</b> 1:3,18 8:5 9:5,16 10:3,5 11:12,19 12:21 13:4,13,21 14:12 14:21 15:14 16:5 17:11,19 18:4,11 18:20 <b>z</b> <b>zach</b> 9:9 <b>zero</b> 107:2,7 111:14 112:23 220:19 223:20 224:5,21 237:14 254:5 <b>zimmerman</b> 19:17
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**Exhibit B**

10/7/2019 Confirmation Hearing Transcript

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

4 - - - - - x

5 In the Matter of:

6

7 SEARS HOLDINGS CORPORATION,

8

9 Debtor.

10 - - - - - x

11

12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15

16 October 7, 2019

17 1:07 PM

18

19

20

21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: NAROTAM RAI

1 HEARING re Notice of Hearing : Notice of Continuation of  
2 Hearing on Confirmation of Modified Second Amended Joint  
3 Chapter 11 Plan of Sears Holdings Corporation and Its  
4 Affiliated Debtors

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25 Transcribed by: Sonya Ledanski Hyde

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18 SONIA COLON  
19 JOHN BRINGARDNER

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1 P R O C E E D I N G S

2 THE COURT: Okay. Good afternoon. In Re: Sears Holdings  
3 Corporation, et al.

4 MR. SINGH: Good afternoon, Your Honor. Sunny  
5 Singh, Weil Gotshal, on behalf of the Debtors.

6 Your Honor, we're here for the continued  
7 confirmation hearing. Before we pick up with where we left  
8 off, I thought I could give the Court with some updates. We  
9 do have at least one resolution I'd like to announce, as  
10 well as some other matters.

11 THE COURT: Okay.

12 MR. SINGH: So, Your Honor, following the hearing  
13 last week, I would like to report that we have settled the  
14 objection filed by Pearl Global Industries, with Mr. Wander,  
15 who is here. I'm just going to recite the terms of the  
16 parties' agreement and I'll ask him to just confirm.

17 Your Honor, Pearl Global Industries will receive  
18 an allowed claim of \$1,130,000 without offset or deduction.  
19 That's an administrative expense claim. That's reduced,  
20 Your Honor, from something in excess of \$1.5 million that  
21 had been asserted.

22 There will be a waiver, by the estate, of any  
23 potential preference claims against Pearl. An additional \$1  
24 million, Your Honor, will be contributed from the carveout  
25 to the estate for distribution in the initial distribution.

1 So, Your Honor, under the consent program we had the initial  
2 distribution of \$20 million, so now that will be \$21 million  
3 and it will include this additional increment of \$1 million  
4 from the carveout.

5 THE COURT: Okay.

6 MR. SINGH: In addition, Pearl agrees, excuse me,  
7 that it will opt-in to the consent program and that it now  
8 withdraws its objection and supports confirmation of the  
9 plan.

10 Your Honor, those are the terms with Mr. Wander.  
11 Maybe I'll just ask him to confirm in case I missed anything  
12 or --

13 MR. WANDER: That's correct, Your Honor.

14 THE COURT: Okay. Was --

15 MR. SINGH: So, Your Honor, that issue is  
16 resolved. I would just like --

17 THE COURT: Was the assessment of Pearl's claim  
18 and preference risk done on an assessment of the merits?

19 MR. SINGH: Yes, Your Honor. So as I mentioned,  
20 Mr. Wander's client, Pearl, had asserted a claim of an  
21 administrative expense at -- in excess of \$1.5 million. So  
22 over the weekend, and finally last hearing, we considered,  
23 you know, the validity of his claims. He had -- you know,  
24 they had somewhat of a world import issue, also inducement  
25 arguments with respect to 503(b)(1), which were sort of

1 legal disputes between us and we think we've resolved those  
2 at a fair place.

3 We also did look at, obviously, the preference  
4 exposure, you know, that has -- that Pearl had, took that  
5 into consideration, as well as the incremental \$1 million  
6 coming in from the carveout. And, Your Honor, we did review  
7 all of that with the Creditors Committee, Akin Gump, in  
8 particular and, you know, everybody's signed off and on  
9 board as to where those issues have now landed.

10 THE COURT: Okay. And did -- was that preference  
11 resolution consistent with the analysis by the firms that  
12 had been retained to do the --

13 MR. SINGH: Yes, they were -- we were coordinating  
14 with them every step of the way, and it took into account,  
15 sort of, you know, what potential defenses could be  
16 asserted, and at the end of the day what we thought the  
17 exposure really could be. So yes, we -- you know, that was  
18 in complete coordination with the ASK firm.

19 THE COURT: Okay.

20 MR. SINGH: So, Your Honor, we think we've landed  
21 in a good spot there. Just one or two other changes I would  
22 just like to note, with respect to the consent program.  
23 Your Honor, following the hearing last week, and some of the  
24 concerns the Court raised with respect to those creditors,  
25 administrative expense creditors, who neither opt-in, nor

1 opt-out of the settlement, so that sort of third class we  
2 were talking about. So, Your Honor, we've changed the  
3 consent program so that those parties now, their aggregate  
4 recovery, instead of being capped at 75 cents of the allowed  
5 amount of their administrative expense claim, they would be  
6 capped at 80 percent of the allowed amount of their  
7 administrative expense claim.

8 So you've really got, sort of, three categories of  
9 administrative expense creditors. Those who affirmatively  
10 opt-in. And we've made the opt-in timing the same for both,  
11 so everybody gets 33 days to opt-in or opt-out. Those who  
12 affirmatively opt-in will get the benefit of the initial  
13 distribution, they will also get -- but they will be capped  
14 at 75 cents of the allowed amount of their claim. The  
15 second category, who neither opt-in nor opt-out, they will  
16 be bound by the administrative expense consent program but  
17 they will have their aggregate recovery capped at 80 cents.  
18 And although they won't participate in the initial  
19 distribution, the second distribution first has to go to  
20 true them up to the initial recovery. And then finally,  
21 anybody who opts-out, of course, will retain their rights  
22 under the plan to be paid in full, a hundred percent of the  
23 allowed amount of their claim on the later of the effective  
24 date or the date that the claim actually becomes allowed.

25 So we've made those changes and we did file a

1 proposed confirmation order that reflects those changes,  
2 Your Honor. We'll have some more clean up based upon what I  
3 announced earlier. And we also did file a revised form of  
4 notice that would go out, and Your Honor has a copy of those  
5 and we can review those towards the end, if Your Honor would  
6 like to.

7 But that basically takes into account some of the  
8 issues that you had raised and also just making it clear, we  
9 included a chart that sort of makes it clear, you know, what  
10 happens if you are in the opt-in category, what happens if  
11 you're in the opt-out, and what happens if you're, you know,  
12 in neither opt-in or opt-out. So hopefully that's much  
13 clearer. And we added, you know, some of the information  
14 from the declarations, in particular, about estate assets,  
15 et cetera.

16 THE COURT: And the risk factor discussion?

17 MR. SINGH: Right, exactly. We updated all of  
18 that.

19 And Judge, just a couple of other changes or  
20 issues we're working through. ESL and Cyrus had asked us to  
21 just make clear that the segregation of funds that we've  
22 been talking about in connection with the litigation trust  
23 funding, that's the \$25 million and the 10 million, they are  
24 going to send us some language and we may just recite it in  
25 the record later, but I just wanted the Court to know that

1 we're talking through that to make it clear that it's not --  
2 those assets, although they're being put in segregated  
3 accounts, they remain the property of the estate, they're  
4 not, sort of, being removed as you would think of maybe  
5 carveout funds that go to a trust fund, but they're sort of  
6 available --

7 THE COURT: That's consistent with the language  
8 you've already offered up that --

9 MR. SINGH: Correct. Paragraph --

10 THE COURT: -- distribution into the trust doesn't  
11 --

12 MR. SINGH: Exactly. It's Paragraph 59 of the  
13 proposed confirmation order.

14 THE COURT: Okay.

15 MR. SINGH: And then I think Cyrus had requested  
16 additional notice, which we've agreed to. Just 20 days, we  
17 would provide notice. So we put in, you know, the sort of  
18 reporting prior to the effective date, we would also add in,  
19 you know, prior to make any post-effective date  
20 distributions, we'll provide parties-in-interest with 20  
21 days' notice so they have an opportunity to know that.

22 THE COURT: Just the first distribution?

23 MR. SINGH: Just -- well, any distribution  
24 following the effective date.

25 THE COURT: Oh, okay.



1 MR. SINGH: Yeah.

2 THE COURT: All right.

3 MR. SINGH: So, Your Honor, those are some of the  
4 changes we're working through, I just wanted to give the  
5 Court an update before we started with the balance of the  
6 hearing. But I'm happy to proceed however you'd like at  
7 this point.

8 THE COURT: All right. Well, I've seen those  
9 documents, I also saw the proposed fourth supplement that  
10 has the proposed terms for the --

11 MR. SINGH: Oh, yes, I failed to mention --

12 THE COURT: -- liquidation trustee's --

13 MR. SINGH: Yes. We did file --

14 THE COURT: -- compensation?

15 MR. SINGH: Exactly. I failed to mention. I  
16 apologize.

17 We did file the proposed compensation for the  
18 litigation trustees. That would kick in, Your Honor, should  
19 you enter the confirmation order, basically on the  
20 confirmation date, because those individuals are stepping in  
21 as litigation designees, you know, as soon as the  
22 confirmation order is entered, other than with respect to  
23 the preference claims, because that's outside of their  
24 mandate. But then post-effective date it, sort of, would  
25 include the preference claims. But we did file that,

1 parties have three weeks to object. We have extra copies if  
2 anybody didn't see it. We filed it just this morning before  
3 the hearing. And so that is now always been on file, and we  
4 took it out of the confirmation order.

5 THE COURT: Okay.

6 MR. SINGH: Okay. Thank you, Your Honor.

7 THE COURT: Okay. So I think where we left off  
8 Mr. Fox was speaking. And I have to say, at the end of a  
9 very long hearing, I think I did a disservice to Mr. Fox.  
10 He's always been a very aggressive advocate, but never  
11 untethered from reality. And I hope he didn't have an  
12 existential moments over the weekend where he doubted that,  
13 but in any event, if you did, I'm sorry if you did.

14 MR. FOX: Actually, Your Honor, I thought you  
15 handed me the keys. Thank you.

16 THE COURT: Well, then maybe you did.

17 MR. FOX: Thank you, Your Honor. I appreciate  
18 that. It was a long day.

19 I do want to just make a couple of preliminary  
20 comments before I get back to the argument. One, I want to  
21 be clear, Wilmington Trust is the indentured trustee for the  
22 6-and-5/8th percent senior secured notes to 2010. That's  
23 the capacity in which I appear today, not on behalf of  
24 anybody else.

25 And just so it's clear, in case there's any

1 confusion, ESL does not own any of how to notes. And -- so  
2 I'll leave it at that.

3 Secondly, Your Honor, just as a preliminary  
4 matter, as they say in public speaking, tell them what  
5 you're going to say, say it, and then then tell them what  
6 you said. So I started into the argument about the  
7 settlement, but I want to be clear, and I'm going to say  
8 this at the end, that there is a plan here that Your Honor  
9 could confirm, assuming that the other issues that have been  
10 raised by others are addressed, that does not require the  
11 plan settlement to be approved. And in fact, the very fact  
12 that that plan exists I think may make it impossible for the  
13 Court to approve the plan settlement, but I'll come to that  
14 a little bit later.

15 To get back to it, Your Honor, the -- in making a  
16 determination as to whether the facts the Debtors have  
17 elicited satisfy the requirements to confirm the -- or to  
18 approve the planned settlement, the Court must also look to  
19 the Debtors' action in this case, not just to the  
20 declarations that have been offered into evidence. And  
21 we've included, in the exhibits, the documentation that  
22 shows those actions.

23 In particular, Your Honor, on February 9th, 2019,  
24 the Debtors announced a settlement with the PBGC that -- to  
25 allow the PBGC an \$80 million priority claim and an \$800

1 million unsecured claim. Notably, that agreement provided  
2 that the Debtors would not seek to substantively consolidate  
3 the Debtors' estates. Following that, on April 17th, 2019,  
4 the Debtors filed a plan, which again, did not provide for  
5 substantive consolidation of these cases. It wasn't until  
6 May 16th, a month later, that the Debtors filed an amended  
7 plan which purported to settle substantive consolidation by  
8 substantively consolidating the Debtors.

9 And according to the confirmation brief, pursuant  
10 to the plan settlement, the PBGC agreed to settle  
11 substantive consolidation issues under the plan, that's at  
12 Paragraph 261 of Docket 5144. So it seems, at least in the  
13 initial go round, or the initial rollout of the substantive  
14 consolidation settlement, it was allegedly a settlement  
15 between the Debtors and the PBGC over an issue that was not  
16 in dispute between them since they had both agreed not to do  
17 that and the Debtor had filed a plan that provided that it  
18 would not do that.

19 So a debtor can settle or compromise a -- you  
20 know, can enter into settlements and compromises, but the  
21 definition of settlement or compromise requires that there  
22 be an active dispute. So at least at that time, with  
23 respect to the PBGC, there was not.

24 So -- and when we asked Mr. Murphy, and your  
25 comment -- your request before the lunch break on Thursday

1 was that we provide you with the specific areas of testimony  
2 that we had designated from the deposition, so I'll do that  
3 as I go through, but Mr. Murphy didn't know what dispute the  
4 Debtors referred to in the disclosure statement for the  
5 amended plan either.

6 When he was asked about that, this is on Page 72,  
7 Line 11 of the deposition testimony that was designated, the  
8 question was: "So it says discuss below, after filing the  
9 initial plan and disclosure statement on April 17th, 2019,  
10 the Debtors and the PBGC agreed to certain modifications to  
11 the PBGC settlement in exchange for the settlement of  
12 disputes and potential litigation regarding whether the  
13 Debtors should be substantively consolidated. Do you know  
14 what disputes this is referring to?" Answer: "Specifically,  
15 I was relying on counsel for the detailed disputes. At a  
16 high level it's their claim for substantial unsecured debt  
17 and administrative debt claims." Question: "Whose claims?"  
18 Answer: "The PBGC." Question: "Well, it refers to a  
19 settlement of disputes and potential litigation regarding  
20 whether the Debtor should be substantive consolidated. So  
21 who are the parties to that dispute; do you know?" Answer:  
22 "I'd have to rely on counsel for that specific answer."  
23 Question: "So you don't know what dispute and you don't  
24 know who the parties were; is that correct?" Answer: "I'm  
25 not sure what specifically. This says settlement of

1 disputes and potential litigation, and I'm taking it at face  
2 value. There were disputes and litigation. I'm not -- I'm  
3 providing financial information analysis -- and analysis  
4 with regards to any settlement offers."

5 Mr. Genender: "To be fair, he's just asking if  
6 you know who the parties to this -- to the dispute  
7 referenced understand that language are." Mr. Fox: "That's  
8 correct." Mr. Genender: "If you don't know, he's asked --  
9 answer I don't know."

10 Mr. Murphy didn't know why the Debtors decided to  
11 file a substantive consolidation plan on May 16th, 2019  
12 either and he was involved in that decision. Again, he was  
13 asked -- I asked him: "Between April 17th, 2019 and May 16,  
14 2019, what changed that led to the Debtors to file a  
15 substantive consolidation plan rather than the  
16 nonconsolidation plan filed on April 17th? What changed in  
17 that one-month period?" Answer: "I can't answer." Mr.  
18 Genender: "To be fair, he asked you to rephrase it, you  
19 repeated it. Just to be fair, he asked you to rephrase it."  
20 By Mr. Fox: "Do you understand my question, Mr. Murphy?"  
21 Answer: "Yes." Question: "Is there some reason why you  
22 can't answer it?" Answer: "Basically I wasn't involved in  
23 the high-level discussions regarding that final decision."

24 He then went on, though, to provide that it  
25 appears that the real problem was the administrative

1 insolventcy of Debtors other than Kmart. So I asked him:  
2 "So far as you know, is it fair to say -- is it fair to say,  
3 as far as you know, sitting here today, nothing changed  
4 between April 17th, 2019 and May 16, 2019 that caused the  
5 Debtors to switch from a nonconsolidation plan to  
6 substantive consolidation plan?" Mr. Genender: "I'm going  
7 to object. That misstates his testimony and lack of  
8 foundation." Answer: "I'd have to reflect on that period  
9 of time and what I have in my declaration to see if there's  
10 a better answer than say other than during that 30 days  
11 there was additional analysis and discussions. It's an  
12 evolving process. That's as far as I could go."

13 Question: "What additional analysis are you  
14 referring to?" Answer: "The intercompany analysis, the  
15 waterfall effect of where a value is landing with regards to  
16 each Debtor." Question: "When you say the analysis of  
17 where value is landing, how is that relevant to the analysis  
18 of whether you find -- filed a substantive consolidation  
19 plan or not?" Answer: "Based on the information and the  
20 analysis of the intercompany waterfall. If you looked at  
21 the deconsolidation liquidation analysis, the value at the  
22 end of the waterfall was substantially ending up in the  
23 Kmart corporation entity." Question: "So is it fair to say  
24 that the problem became that there were a bunch of  
25 administratively insolvent Debtors on a standalone basis,

1 after you did your analysis, and maybe Kmart and some others  
2 that were administratively solvent?" Mr. Genender:  
3 "Objection to form." Answer: "Hypothetically, based on  
4 that analysis, yes."

5 Despite the fact that Mr. Murphy was not involved  
6 in the decision to change to a substantive consolidation  
7 plan, although he's their witness on this, and the real  
8 problem was administrative solvency of some Debtors, the  
9 Debtors used Mr. Murphy to try to justify substantive  
10 consolidation. Mr. Murphy enumerates what he says are other  
11 factors for substantive consolidation, and that's at  
12 Paragraph 24 of his declaration.

13 But when I asked him if he knew what the factors  
14 for substantive consolidation were, he couldn't answer and  
15 he said he's not a lawyer. The question was: "How do you  
16 know what the factors are for consolidation?" Mr. Genender:  
17 "He answered questions about the facts." Mr. Fox: "I'm not  
18 asking that." Question: "You can answer." Answer:  
19 "Please rephrase the question. I just don't want to make a  
20 legal -- I'm not a lawyer, so I'm not going to answer a  
21 legal question."

22 Mr. Murphy asserts, in his declaration, that  
23 Creditors dealt with Debtors on a consolidated basis. And  
24 that's one of the two prongs in the Augie/Restivo Test, as  
25 you know, to determine whether or not substantive



1 consolidation is appropriate. But he really has no basis  
2 for his assertion. First of all, the loans specifically  
3 indicate who the borrowers and the guarantors are.

4 The question, this is at Page 126 of his  
5 deposition: "When you say the creditors, and you refer to  
6 the lenders, particularly dealt with Sears as a consolidated  
7 company, isn't it the case that all the loans specifically  
8 indicate who the borrower is, or who the guarantors are of  
9 those loans?" Mr. Genender: "Objection. Form." Answer:  
10 "Yes."

11 And the trade creditors had written contractors,  
12 but Mr. Murphy never even looked at them, he just determined  
13 that they must have been confused. On Page 72 of the  
14 deposition, Question: "Mr. Murphy, take a look at Page 13  
15 of your declaration that's been marked as Exhibit 6, if you  
16 would." Answer: "Okay." Question: "In Paragraph 24, at  
17 the bottom of that page, you say, at the second sentence of  
18 subparagraph A, 'Many Creditors conducted business primarily  
19 with three Debtors, Sears Holding, Sears Roebuck and Kmart  
20 Corporation.' Do you see that?" Answer: "Yes." Question:  
21 "Then you say, at the bottom of that paragraph, 'Sears  
22 Roebuck purchased a significant amount of the store  
23 merchandise, both in sold Sears and Kmart stores, right?"  
24 Answer: "Yes."

25 Question: "When the Debtor entered into their

1 transactions that are referenced here with whichever  
2 Creditor, and I'm not talking about loans now, I'm just  
3 talking about trade, were there written contracts, or  
4 purchase orders, or invoices pursuant to which those goods  
5 and services were purchased?" Answer: "Yes." Question:  
6 "Okay. And did those invoices, or contracts or purchase  
7 orders list the name of the Debtor which was buying the  
8 goods or services?" Answer: "Yeah, I don't know."  
9 Question: "You don't know?" Answer: "For specific  
10 invoices for that the Debtors specifically did I didn't get  
11 into that detail." Question: "Never looked at that?"  
12 Answer: "No, not for this, no." Question: "Not for any  
13 part of your substantive consolidation analysis?" Answer:  
14 "No."

15 Now, we did take a look, just randomly, at a  
16 couple of proofs of claim that are on the docket and in fact  
17 the proofs of claim have attached to them specific invoices  
18 which specifically have the legal name of the legal entity  
19 that purchased them. We included four of them, it's Joint  
20 Exhibit 57, 58, 59 and 60, which specifically indicate who  
21 those entities are dealing with.

22 And then what we did was we found entities where  
23 the same entity filed different proofs of claim against  
24 different entities, because they had different claim -- they  
25 had different contracts that specifically name those

1 different entities. So what appears to be to be the case is  
2 the Debtor made an assumption about this, or Mr. Murphy did,  
3 but never actually looked and in fact the evidence would  
4 seem to suggest otherwise.

5 Mr. Murphy also indicated, though, that the  
6 financing method that the Debtors were using was not unusual  
7 for a large public company. Page 174 of his declaration, I  
8 asked him -- I said, "Now turn to Page 14, if you would of  
9 Exhibit 6, at the bottom of the page in Paragraph F. Do you  
10 see that?" Answer: "Yes." Question: "So it says there,  
11 'Financing was provided principally through Sears Holdings  
12 or Sears Roebuck Acceptance Corp with the majority of the  
13 remaining Debtors providing guarantees of the debt. Funds  
14 were centralized and available for all entities.' Do you  
15 see that?" Answer: "Yes." Question: "Okay. Is this  
16 unusual in terms of the large public company operation that  
17 has outstanding loans? Is this description unusual?"  
18 Answer: "Not in my experience."

19 Now, Mr. Murphy says, in his declaration in  
20 Paragraph 24, at Pages 14 to 15, there are a number of  
21 factors which are satisfied to show that there may have been  
22 confusion among the Creditors as to what entities they were  
23 dealing with, and it's the usual list of overlapping board  
24 members, a central office, centralized operations, et  
25 cetera, you know, tax statements, consolidated financial

1 statements being filed, all those things. First of all,  
2 with respect to tax returns, they're required to file  
3 consolidated tax returns and they're required, by SEC rules,  
4 a public company is, to file consolidated financial  
5 statements.

6 But the problem with all this is that, among other  
7 things, the Debtors knew all of this when they got the PBGC  
8 deal which was in early 2019. It was just figured out after  
9 filing the plan in April, or even after agreeing in February  
10 who the directors were of which entities, where the offices  
11 were located, which is in Huffman Estates, as the world  
12 knows, or, you know, that they had centralized financial  
13 reporting, Treasury, HR, Tax Planning, Real Estate  
14 Management, Internal Audit, et cetera. All of that was  
15 known, that was no secret to anybody. So nothing changed  
16 between the time that the Debtors filed their -- at least  
17 with respect to this prong of substantive consolidation,  
18 with respect to the issue of Creditors not understanding who  
19 they were dealing with.

20 And I think it's also important to note that this  
21 was a public company that filed financial statements, and  
22 you can take judicial notice of those, the fact that it was  
23 very clear to everybody, or anybody who bothered to look,  
24 that they had outstanding loans, that those loans were  
25 guaranteed at multiple entities within the Debtors. The

1 documents are actually in the SEC files. That they had  
2 multiple, you know, obligations of each of the entities to  
3 the PBGC as part of the control group. This wasn't any  
4 surprise to anybody, or certain not to other -- to trade  
5 creditors or others who dealt with a single entity, when  
6 they decided to enter into agreements, or make loans, or  
7 sell goods and services to any of these debtor entities.

8 Now, with respect to the analysis of hopeless  
9 entanglement, Mr. Murphy, and I think you've heard this now,  
10 testified that he joined M3 in December of 2018, which was  
11 three months after the bankruptcy cases were commenced, but  
12 perhaps more importantly, he hasn't done this type of an  
13 analysis before. When I asked him, at Page 40 of his  
14 declaration, "Have you done this sort of analysis at other  
15 companies besides the Sears Debtors?" Mr. Genender:  
16 "Objection." Answer: "I would say there are very few  
17 people who've done this type of analysis. There are a few,  
18 very few companies the size of Sears with the methodology  
19 they used for using intercompany accounting to track all  
20 their activities, certainly not the size of the company.  
21 This is -- I've done second intercompany analyses for other  
22 liquidation analyses for other companies, never the size of  
23 this one." And then at Page 41, Question: "All right. Let  
24 me ask it this way. Have you ever performed a similar  
25 analysis of intercompany claims at a company the size of

1 Sears, laying aside the volume of transactions?" Answer:

2 "No."

3 Now, Mr. Murphy claims that there were potential  
4 difficulties in reviewing financial records --

5 THE COURT: I'm not sure what that question --

6 MR. FOX: I'm sorry?

7 THE COURT: That question didn't seem to make any  
8 sense to me. I mean, is there any such entity?

9 MR. FOX: There may be.

10 THE COURT: It would seem to be almost  
11 inconceivable that there'd be a company like Sears that  
12 wouldn't have the same types of intercompany transactions --

13 MR. FOX: Well --

14 THE COURT: -- because Sears has these three main  
15 operating centers. But anyway, you can go ahead.

16 MR. FOX: Mr. Murphy claimed a potential  
17 difficulty in reviewing the financial records and in fact  
18 that was not actually the case. When Mr. Murphy looked at  
19 post-petition financials, and found what appeared to be  
20 incorrect entries, it turned out that Sears could show him  
21 where those entries had been corrected.

22 So at Page 31 he testified, Question: "So those  
23 adjustments that you concluded Sears had entered incorrectly  
24 during the post-petition period?" Answer: "Those were  
25 adjustments when we queried, we followed up with the

1 company, that the company said, oh, that was incorrect,  
2 here's where we corrected it." Question: "And were their  
3 corrections accurate?" Answer: "They appeared accurate  
4 based on their responses. Again, as far as the intercompany  
5 activity was concerned, for the accountant perspective, if  
6 the debit and credits matched, and their explanation for  
7 what the correction was meant to be, then we moved forward.  
8 We made sure we either identified the correction in our  
9 overall matrix to make sure we weren't grossing up  
10 receivables and payables this far, or due to and due froms  
11 from a company sense for our net results." Question:  
12 "Well, what I'm trying to understand is did you find errors  
13 in work that Sears had done that were not corrected?"  
14 Answer: "No."

15 And Mr. Murphy's conclusion was that the activity  
16 was -- that the activity he summarized was consistent with  
17 the balance sheet. So on Page 39, when I asked, "Well, you  
18 said it was a process for you to understand how the  
19 intercompany transactions were recorded on the balance sheet  
20 and how the balance sheet damages would match up. So my  
21 question is, after you went through that process to  
22 understand this, what did you finally determine?" Mr.  
23 Genender: "The balance sheet changes, you said damages."  
24 Mr. Fox: "I'm sorry, changes." Mr. Genender: "Objection.  
25 Form." Answer: "Our conclusion was that the activity we

1 were summarizing by debtor entity for due to and due from,  
2 based on the methodology of the company the Debtors used to  
3 aggregate the various entries, was consistent with what was  
4 reported in the balance sheet."

5 Mr. Murphy's analysis left him with an 80 to 90  
6 percent confidence level of the post-petition intercompany  
7 balances. And on Page 54 when I asked, "Now turning to Page  
8 3 of Exhibit 1, you say that after you receive -- you  
9 reviewed analysis and discussions with Sears management, you  
10 have an 80 to 90 percent confidence level of a current  
11 intercompany post-petition activity as a reasonable  
12 indication of the due from and due to balances amongst the  
13 Debtors; is that correct?" Mr. Genender: "Objection.  
14 Form." Answer: "That's what I stated. Yes." Question:  
15 "And what's the due from and due to balances amongst the  
16 Debtors on just a post-petition basis, right?" I'm sorry,  
17 let me read that again. Question: "And that's the due from  
18 and due to balances amongst the Debtors on just a post-  
19 petition basis, right?" Answer: "Yes."

20 Now, Mr. Murphy complains, in his declaration, as  
21 did the Debtors in their disclosure statement from May,  
22 starting in May, which seems, in some cases, to word-for-  
23 word mirror what Mr. Murphy's declaration then said in  
24 September, but he refers to an antiquated system, but  
25 nevertheless basically admitted it does not affect the



1 company's accounting. It simply was problematic for him  
2 because he couldn't push a button and get a query of what  
3 all the intercompany transfers were, so that he could look  
4 at them and review the history.

5 Question, this is on Page 57, starting on  
6 Line 6: "Now, in the next point underneath that, as part of  
7 the second bullet point, it says 'Legacy accounting systems  
8 are not adequately robust in our view. What do you mean by  
9 that?" Answer: "They're not modern, they're antiquated and  
10 we weren't able to request a summary of intercompany  
11 transactions that made it easy to understand the activity  
12 between all entities." Question: "You were not able to  
13 obtain this for most petition activity?" Answer:  
14 "Correct."

15 Question: "Well, does the fact that the accounting  
16 system is what you call antiquated mean that it does not  
17 correctly keep track of the company's accounting?" Answer:  
18 "No, I'm not saying that." And he went on.

19 And on Page 56, Question: "But to go back to my  
20 question, does the fact that the accounting system is, as  
21 you call it, antiquated, mean that it was not properly  
22 handling the accounting for the Debtors?" Answer: "That's a  
23 conclusion for the auditors. For a consolidated financial  
24 statement, you have to talk to their auditors about that  
25 type of question. My point was more specifically to

1 intercompany transactions."

2 Question: "Well, because the accounting system is  
3 antiquated, are you saying that sometimes it added two plus  
4 two to equal five instead of four? Are you saying it was  
5 adding or subtracting incorrectly?" The Answer: "No."

6 On Page 6 he's continuing. Question: "And if you  
7 -- if this antiquated accounting system is not keeping  
8 proper track of the books and records, would you expect that  
9 the auditors would not be able to issue an opinion?" Mr.  
10 Genender: "Objection."

11 Question: "Of the annual audit." Mr. Genender:  
12 "Objection, form." Answer: "That's my understanding."

13 Question: "What's your understanding?" Answer:  
14 "For public accountants on a consolidated -- on a  
15 consolidated financial statement which they are opining on,  
16 they had to have comfort that the consolidated financial  
17 statements met their requirements as far as generally  
18 accepted accounting principles."

19 Question: "And you're not aware that the  
20 accounting statements did not meet the requirements, right?"  
21 Mr. Genender: "Objection, form." Answer: "If they provided  
22 clean opinions, then that would be an indication that they  
23 were okay for the consolidated financial statements."

24 Question on Page 62: "Are you aware that the  
25 company's outside auditors provided anything other than

1 clean opinions?" Mr. Genender: "Asked and answered  
2 (indiscernible)." Answer: "I don't know." Question: "I'm  
3 sorry." Answer: "I don't know."

4 Now, the other thing is that this all related to  
5 the post-petition activity, which is what Mr. Murphy was  
6 really looking at. Mr. Murphy didn't really analyze  
7 prepetition accounting activity.

8 When I asked him on Page 91 of his deposition  
9 transcript, Question: "You previously, as I understood your  
10 testimony, were talking about your analysis of post-petition  
11 intercompany transactions. Was there also an analysis that  
12 you conducted of prepetition intercompany activity?"  
13 Answer: "Yes."

14 Question: "Okay. And was that part of the same  
15 analysis you conducted with respect to the post-petition  
16 activity that we've already talked about, or was that a  
17 separate analysis?" Answer: "With regards to the  
18 prepetition analysis, there wasn't an organized effort  
19 similar to what we did with the post-petition detail."

20 The prepetition analysis was simply limited to  
21 responding to questions about what Mr. Murphy referred to as  
22 the due to/due from by Debtor, by which he means on the  
23 intercompany basis, which Debtors owed money to which other  
24 Debtors, and which Debtors were owed money by other Debtors.

25 And so when I asked him about that starting at

1 Page 93, Question: "You said in your prior answer that you  
2 responded to questions that came up. As I understood your  
3 prior answer, and I'm paraphrasing, it's my understanding  
4 that you were responding to questions that came up with  
5 respect to prepetition intercompany activity. My question  
6 is was your analysis of prepetition intercompany activity  
7 limited to responding to those questions that came up, or  
8 was it more expansive than that?" Mr. Genender: "Objection,  
9 form." Answer: "It was more to respond to questions based  
10 on our observations of the prepetition balances from looking  
11 at the balance sheet."

12 Question: "And what questions were those?"

13 Answer: "Primarily questions regarding what type of effort  
14 would we need to perform in order to break out the  
15 prepetition balances so that we understood the due to/due  
16 forms by Debtor."

17 Question: "And did you prepare any kind of written  
18 analysis that would set forth that analysis?" Mr. Genender:  
19 "Objection, form." Question: "Or that effort?" Answer:  
20 "No."

21 Question: "And do you know when that analysis was  
22 undertaken?" Answer: "Which analysis?"

23 Question: "The one you're referring to of the  
24 questions that came up with respect to prepetition  
25 activity." Answer: "That occurred over the period from

1 January through the filing of this claim."

2 Question: "And that was May 16th?" Answer: "Yes."

3 Now, with respect to the inter -- in the  
4 disclosure statement, the -- and this is the May 16th, and  
5 it's pretty much the same since then, the Debtors have  
6 indicated the -- pointed to the fact that intercompany  
7 amounts were netted out.

8 When I asked Mr. Murphy about that, Question:  
9 "Let's see. Go to 11 -- go to 10 lines from the bottom of  
10 Page 53 -- and this -- that was of the May 16th version of  
11 the disclosure statement. And the sentence in the middle  
12 starts in the middle of the page, says while the Debtors'  
13 accounting systems identifies the entities to which  
14 intercompany payables are due or for which intercompany  
15 receivables are due in the ordinary course, the millions of  
16 entries are netted automatically by the accounting system  
17 and are not summarized by Debtor. Do you see that  
18 sentence?" Answer: "Yes."

19 Question: "Okay. Is that sentence accurate?"  
20 Answer: "Yes."

21 The point is that the Debtors did in fact keep  
22 track of their intercompany accounts, and they did in fact  
23 net them out. Typically what you'll find is that that's not  
24 the case.

25 Mr. Murphy didn't analyze or, I believe,

1 understand the interplay between the intercompany claims and  
2 the cash management system. If you look at the Debtors'  
3 schedules, they'll either show in Schedule AB intercompany  
4 obligations owed to a particular Debtor or in Schedule EF  
5 intercompany obligations owed by that Debtor entity. And in  
6 some cases, there are some Debtors that neither have a  
7 receivable -- an intercompany receivable or an intercompany  
8 payable.

9 What these ultimately are, to the extent they even  
10 have -- either have a receivable or payable is an obligation  
11 effectively to the centralized cash management system. And  
12 when I asked Mr. Murphy about that, this is at Page 99. I  
13 asked him: "When you say not settled, do you mean did not  
14 hand cash around to settle those; is that what you mean?"  
15 Answer: "In its simplest form. But the bottom line is that  
16 they did not either collect on the receivables or pay on the  
17 payable."

18 Question: "To each other?" Answer: "Correct."

19 Question: "But they kept track of how much each  
20 one owed to each other one, and they did, and they netted  
21 those out, right?" Mr. Genender: "Objection, form."

22 Answer: "In the millions of transactions that relied on the  
23 balancing, the general ledger balancing effort by the, you  
24 know, the information systems, millions -- billions of  
25 transactions, that as long as those transactions netted to

1 zero on a consolidated basis, the company moved on to the  
2 next period. Where the difficulty arises is when you want  
3 to now separate the intercompany transactions from one big  
4 bucket that needs to net to zero to individual Debtors."

5 Question: "Well, if I owe you a dollar, and you  
6 owe Mr. Genender a dollar, and Mr. Genender owes me a  
7 dollar, are you saying that it's not appropriate for us to  
8 just agree that nobody owes anybody anything because we  
9 netted those transactions, or do we actually have to pass  
10 the dollar around to each of us to settle the transaction?"  
11 Mr. Genender: "Objection to form." Answer: "Under that  
12 example, if we all agreed to settle that way, then that  
13 would be the settlement. But if you owed me a dollar, in a  
14 one-dollar example, it's actually too simple. If you owed  
15 me a dollar but that dollar went to a bunch of other  
16 creditors and I have no money to pay Mr. Genender, then it's  
17 not fair. He's not going to receive any recovery from his  
18 payable or receivable from me."

19 Question: "Okay. But the Debtors' records reflect  
20 the fact that some Debtors are in the deficit position,  
21 correct?" Answer: "On a net basis, correct." Okay.

22 Question: "And they just simply don't have the  
23 ability to pay their creditors. That's what it means to be  
24 bankrupt, right?" Mr. Genender: "Objection, form." Answer:  
25 "You're going to have to rephrase that question as to how

1 I'm supposed to answer that with regards to intercompany."

2 Question: "Well, it's the case that on some of the  
3 schedules that the Debtors filed, some of them have  
4 intercompany receivables that are owed to them, and some of  
5 them have intercompany payables that they owe to other  
6 Debtors, and some of them have neither intercompany  
7 receivables nor intercompany payables, correct?" Answer: "I  
8 couldn't answer that because that analysis was not done."

9 Question: "Well, the Debtors filed schedules and  
10 statements under penalty of perjury that say exactly that.  
11 Are you saying those are not true?" Mr. Genender:  
12 "Objection, form. Argumentative. Come on." Answer: "The  
13 schedules were filed based on the best information the  
14 company had -- the Debtors had at that time, and those were  
15 net balances."

16 Question: "Right. Does that mean they're not  
17 accurate?" Answer: "That means that the detail didn't  
18 identify each individual Debtor."

19 The Debtor had a -- Question: "The Debtor had an  
20 integrated cash management system, correct?" Answer:  
21 "That's my understanding."

22 Question: "And all the cash from all the different  
23 Debtors float up into the integrated cash management system,  
24 correct?" "Again, my understanding."

25 Question: "Okay. So if Debtors put cash into that



1 system, or -- then they'd get a credit. And if they took  
2 cash out of that system on a net basis, they'd owe a  
3 payable, correct?" Answer: "Correct."

4 Question: "Okay. And effectively, aren't all  
5 those intercompany payables and receivables simply claims  
6 against the integrated cash management system and the funds  
7 that are available there?" Mr. Genender: "Objection, form."  
8 Answer: "You've got to rephrase that because I'm not sure  
9 what that question is for."

10 Question: "Do you not understand the question?"  
11 Answer: "No, I don't."

12 Question: "Okay. The Debtors kept books and  
13 records of intercompany activity, correct?" Answer:  
14 "Correct."

15 Question: "Okay. But the Debtors did not -- did  
16 not settle between themselves on a periodic basis by  
17 actually transferring cash or property, correct?" Answer:  
18 "Correct."

19 Question: "They simply kept track of their books  
20 of those transfers, correct?" Answer: "Correct."

21 Question: "Okay. To the extent that the Debtors  
22 were dealing with cash and they were running a retail  
23 business, so cash would come in every day, they sold  
24 product, all that cash went into a single cash management  
25 system, correct?" Mr. Genender: "Objection, form." Answer:

1 "Yes."

2 Question: "Okay. And the Debtors' accounting  
3 system would keep track of which entities would put cash  
4 into that accounting system, into that cash management  
5 system, correct?" Answer: "I'm not an expert on that  
6 system, so whether the system provided, quote, and I'm not  
7 sure what you mean by system, but whether the system  
8 provided the detail or individuals had to gather  
9 information, which is my understanding, and book entries,  
10 you know, they did it to the best of their abilities."

11 Question: "Okay. And if the Debtors took cash out  
12 of the system or bills were paid on their behalf, then the  
13 Debtors' books and records would record the fact that  
14 whichever particular Debtor was benefited by that owed a  
15 payable for that benefit, correct?" Answer: "It would be  
16 the ideal system. Whether the Sears -- I didn't audit their  
17 systems to know specifically how all the transactions were  
18 recorded."

19 In other words, Mr. Murphy's testifying that he  
20 can't figure out which Debtors owe money to which other  
21 Debtors or which Debtors are owed money, and he's worried  
22 that they may not be able to pay each other off, but he  
23 doesn't understand anything, apparently, about the cash  
24 management system because that wasn't within his area of  
25 expertise or his area of responsibility, I should say. So he

1 doesn't seem to understand, or the Debtors don't want to  
2 talk about the fact that these are all claims into and out  
3 of the cash management system, the centralized pot of money.

4 And, in fact, he had testified previously -- and I  
5 think I read that portion where he said the Debtors that  
6 needed money would take -- you know, there were -- there  
7 were borrowers and guarantors, and entities that needed  
8 money would take it out. But the Debtors recorded all this  
9 information, so it's available.

10 THE COURT: But I guess it's an integrated cash  
11 management system, so they net out an aggregate amount, but  
12 not Debtor by Debtor. It goes out of the system to whoever  
13 needs it, but it doesn't show -- it doesn't match up who  
14 gets it and who put it in.

15 MR. FOX: No, it does. Your Honor, it's the same  
16 as if you put your money in a bank. The bank then lends  
17 that money out to a whole bunch of people. You don't know  
18 who they are. And most of them hopefully pay it back.

19 THE COURT: But as far as intercompany claims go  
20 --

21 MR. FOX: Mh hmm.

22 THE COURT: -- I don't -- I don't know whether I  
23 have a claim against, if you bank at my bank, you or anyone  
24 else. I just have a claim against the bank.

25 MR. FOX: That's right.

1 THE COURT: On an integrated basis.

2 MR. FOX: And that's exactly what was happening  
3 here.

4 THE COURT: So how do you track the intercompany  
5 claims that way?

6 MR. FOX: They kept track of who put money, who  
7 took money out.

8 THE COURT: Yeah, but not -- out of the integrated  
9 system but not vis-à-vis each entity.

10 MR. FOX: That's all there was though.

11 THE COURT: I know. That's -- I guess that's why  
12 I'm saying that doesn't seem to be a ready way to determine  
13 which entity owes the other entity as opposed to sort of a  
14 general cash management system on a net basis.

15 MR. FOX: All the borrowers owe it to the bank,  
16 and all the -- all the --

17 THE COURT: Right.

18 MR. FOX: -- lenders are owed by the --

19 THE COURT: But if that's -- but the bank is  
20 consolidated. That's all of -- all of the Debtors.

21 MR. FOX: Mh hmm.

22 THE COURT: So to me, the testimony you were  
23 reading doesn't show an ability to break out which Debtor  
24 owes which other Debtor. It just shows which Debtor is net  
25 negative and net positive against a collective bank.

1 MR. FOX: That's right, and that's all you need to  
2 know because they --

3 THE COURT: Well, I'm not sure about that. If the  
4 money that K-Mart puts in goes 90 percent to Sears X and 5  
5 percent to Sears Y and 2 percent to Sears Z, and 1 percent  
6 to (indiscernible), how do you work out the intercompany  
7 claims among those entities?

8 MR. FOX: Those entities that have a net payable  
9 have to pay money back into the centralized pot to the  
10 extent that they can, and they do. Then the creditors with  
11 the net receivable get to take their money out.

12 THE COURT: Of what, though? Because --

13 MR. FOX: Out of that centralized pot.

14 THE COURT: But then it's centralized.

15 MR. FOX: Yes. It's --

16 THE COURT: It's not -- the assets -- you're --  
17 that presumes the substantive consolidation of the assets  
18 but not the liabilities.

19 MR. FOX: It's not -- but they kept track of it.

20 THE COURT: Of what?

21 MR. FOX: They kept track of, in a sense, the  
22 centralized bank account.

23 THE COURT: I get that.

24 MR. FOX: Right.

25 THE COURT: But --

1 MR. FOX: So --

2 THE COURT: Again, if you look at the assets of  
3 one of the Sears entities, in a -- in a non-substantive  
4 consolidation context, those assets would include the claims  
5 of that entity against each of the other entities because  
6 each of them -- it wouldn't matter if they were all solvent.  
7 But if they're not solvent, then it depends on whose claim  
8 -- whose claim is against who.

9 You know, if one entity on perhaps a net basis  
10 neither owes nor is owed on a consolidated basis through the  
11 integrated system but it owes a lot of money to an entity  
12 that can't pay it and is owed a lot of money by another  
13 entity that can pay it, you can see how that would be  
14 different than the flipside of that, which is it owes a lot  
15 of money to a company that it can pay, but it collects from  
16 a company that can't pay it at all.

17 MR. FOX: But the point is that the company's  
18 systems have already netted all those amounts.

19 THE COURT: Only as far as the company as a whole  
20 is concerned, not again each entity.

21 MR. FOX: No, they have netted it against each  
22 entity. And, in fact, the Debtors have said exactly that.

23 THE COURT: Well, that -- maybe I'm missing --  
24 see, I thought --

25 MR. FOX: But --

1 THE COURT: What I took away from it is that  
2 there's a net amount owed to the bank.

3 MR. FOX: Yes.

4 THE COURT: And a net amount owed by the bank in  
5 some instances.

6 MR. FOX: Mh hmm.

7 THE COURT: But not entity by entity.

8 MR. FOX: Because they've netted it entity by  
9 entity, leaving claims against the bank or amounts owed to  
10 the bank.

11 THE COURT: But the --

12 MR. FOX: So --

13 THE COURT: I think the net -- entity-by-entity  
14 netting is as against each entity as against the whole, not  
15 as against each entity separately.

16 MR. FOX: But the point -- the ultimate point is  
17 that we know who has to put money in, assuming they have it,  
18 and who gets to take money out.

19 THE COURT: That's what -- that's the part I'm  
20 missing. I don't see -- if you're saying they take it out  
21 of the common pot, then again it seems to me that you're  
22 substantively -- you're presuming substantive consolidation  
23 of assets but not liabilities.

24 MR. FOX: No, because they know who owes what to  
25 the pot and who's entitled to what from the pot.

1 THE COURT: But it -- but it's the common --

2 MR. FOX: In other words, they know --

3 THE COURT: But it's the common pot. It's not the  
4 individual Debtors owing each other.

5 MR. FOX: I understand your point, Your Honor, but  
6 I'm suggesting -- and I don't know a quicker way to -- a  
7 better way to say it. We shouldn't -- we don't need to get  
8 hung up on which entity owes to which other entity when  
9 that's all been addressed within the system, leaving simple  
10 claims to and from the centralized pot.

11 THE COURT: But that may make sense if everyone  
12 gets paid the same from everyone, but that's not what  
13 happens here. So I think you would -- clearly, there would  
14 be creditors of individual entities that would want to say,  
15 I want to make sure my entity gets paid by the entity that I  
16 actually lent to. And actually, you don't really show any  
17 lending to an entity because it all goes through the common  
18 pot.

19 MR. FOX: What you ultimately want to wind up is  
20 getting the money back that you're owed.

21 THE COURT: But by -- but by whom? But the money  
22 back you're owed is by the bank. I don't --

23 MR. FOX: Yes.

24 THE COURT: Again, when I lend to Chase by putting  
25 my money in Chase Bank --



1 MR. FOX: Right.

2 THE COURT: -- I don't -- I get it back from  
3 Chase. I don't get it back from each individual account at  
4 Chase.

5 MR. FOX: That's correct.

6 THE COURT: But this -- but this is not that type  
7 of situation because you're talking about individual Debtors  
8 owing each other --

9 MR. FOX: That's --

10 THE COURT: -- as opposed to the -- to the company  
11 bank, which combines it all.

12 MR. FOX: Well, based --

13 THE COURT: And you have to unscramble all that to  
14 determine who owes who.

15 MR. FOX: Well, actually, based on Mr. Murphy's  
16 testimony, that's not exactly right that monies that -- if  
17 they needed money, they took it out. If they had money,  
18 they put it in. It all went into the centralized system.  
19 It -- Sears Roebuck didn't say, hey, K-Mart, you need some  
20 money? Here you go. If K-Mart needed money, it went to the  
21 treasury and took it out of the cash management system to  
22 pay its bills.

23 THE COURT: But who -- but who would it get paid  
24 from now?

25 MR. FOX: It would get --

1 THE COURT: You would say it would get paid from  
2 the main pot.

3 MR. FOX: Yes.

4 THE COURT: So how do you -- so that's the only  
5 intercompany claim you're counting.

6 MR. FOX: That's -- yes, and the intercompany --  
7 the Debtors that have intercompany obligations have to put  
8 money in and -- to the extent that they have it, and the  
9 entities that are -- have intercompany receivables would  
10 then get to take their -- that money out. And if there's  
11 not enough, they would do it on a pro rata basis, which is  
12 what we would always do. You don't need to go back and look  
13 at every single transaction for the last five years or 10  
14 years or, as Mr. Murphy seemed to think, 100 years because  
15 Sears is that old in order to sort this out. It's been  
16 sorted, and you can -- you can determine that.

17 Now, and in fact, you know, Mr. Murphy didn't seem  
18 to know that the Debtors don't have separate bank accounts  
19 with which to settle up intercompany accounts. They just  
20 leave it to the pot. So at Page 111 when I asked, "That  
21 disclosure statement says the Debtors believe there would be  
22 significant difficulties and enormous costs that would be  
23 borne by the estates in order to disentangle the prepetition  
24 intercompany claims on a Debtor-by-debtor basis, which would  
25 deplete the recoveries for all creditors and cause

1 unnecessary and costly delays in the confirmation of the  
2 plan and distributions to creditors; do you see that  
3 statement?" Answer: "Yes."

4 Question: "Why would -- as far as you know, why  
5 would it be necessary to disentangle the prepetition  
6 intercompany claims on a Debtor-by-debtor basis?" Answer:  
7 "On a Debtor-by-debtor basis -- because the numbers that are  
8 reflected in the books and records are on a net basis, they  
9 do not reflect those receivables that may or may not be  
10 collectible on a Debtor-by-debtor basis from each Debtor or  
11 non-Debtor entity in order to pay or which Debtor may be  
12 able to pay its particular payables. Those are net  
13 numbers."

14 Question: "Do any of the Debtor have separate bank  
15 accounts other than the concentration account?" Answer: "I  
16 don't know the answer to that question. I wasn't involved  
17 with the treasury."

18 Question: "Okay. Do any of the Debtors hold or  
19 have bank accounts that are used really for anything other  
20 than to have funds flow up to the concentration account?"

21 Answer: "Again, I don't have firsthand knowledge of that."

22 He's making assumptions that he can know the due  
23 from and due to, and that if he knew that, somehow it would  
24 make a difference. And the point is it would not because  
25 that's not the way the Debtors operated, which he admits is

1 not an unusual way for companies like this to operate.

2 There is further -- he prepared -- and has -- and  
3 the Debtors have offered no analysis showing the cost to  
4 disentangle other than to say how difficult it would be. So  
5 when I asked him -- make sure I have the right page.

6 Question -- it's the top of Page 113. "Now, this  
7 statement refers to the enormous cost that would be borne in  
8 order to disentangle. Do you see that phrase, enormous  
9 cost?" The Answer: "Yes."

10 Question: "Is there an analysis that was prepared  
11 that shows what the cost would be expected to be?" Answer:  
12 "Not that I'm aware of."

13 So while they make the assertion that it would be  
14 an enormous cost, the never actually prepared any analysis.

15 Now, Mr. Murphy asserts -- not that he's qualified  
16 to do so -- that there's a 75 percent chance of substantive  
17 consolidation. That's his opinion, obviously, and he's not  
18 an expert as we've qualified as such. And, in fact, he  
19 really has no idea.

20 So when I asked him on Page 146 of his deposition,  
21 Question: "Let me ask you my question again, which is what's  
22 the basis for your assumption that there's a 75 percent risk  
23 of interstate, intercreditor litigation?" Mr. Genender:  
24 "Objection, form. Asked and answered." Answer: "I don't  
25 know how to answer it any way other than how I just did."

1 Question: "How did you come up with 75 percent?"

2 Answer: "We basically -- we looked at the factors that we  
3 established based on experience and then putting all the  
4 challenges that we saw for executing a deconsolidated plan  
5 as substantial and made an approximation that there would be  
6 a 75-percent risk that should be applied."

7 Question: "Who is we? You said we." Answer: "The  
8 M-III team in discussions of the litigation challenges that  
9 would exist in trying to prosecute this."

10 Question: "Does the M-III -- do you have  
11 experience assessing the risk of litigation of substantive  
12 consolidation?" Answer: "I'm not a lawyer. I do not."

13 Question: "Does anybody else at M-III have  
14 experience assessing the risk of litigation of substantive  
15 consolidation?" Mr. Genender: "Objection, form." Answer:  
16 "I don't know."

17 So the result, though, based on that analysis, is  
18 that in a non-consolidation plan, K-Mart guarantee claims --  
19 which our noteholders have, as do many others -- would get a  
20 recovery at K-Mart of, according to the Debtors, of 7.02  
21 percent. And then the substantive consolidation plan, as  
22 purposed, the recovery would be 2.77 percent, and that's a  
23 significant difference, Your Honor. And that's why we're  
24 here.

25 Now, the -- there is an enhancement that was

1 finally negotiated -- I assume between the Debtors and the  
2 Creditors Committee. We were not party to any of those  
3 discussions -- that there's a 7.6 percent enhancement for K-  
4 Mart guarantees.

5 Now, the Debtors cite a number of cases where  
6 substantive consolidation was approved. Largely, those are  
7 lists for the purpose of establishing that these sorts of  
8 issues have been compromised. And most of them don't really  
9 -- first of all, it seems in most of those cases that the  
10 Debtors cite that the Creditors overwhelmingly seem to  
11 approve the plan, which is not entirely the case here. And  
12 -- but there's not a lot more information about the  
13 circumstances and whether the particular percentages or the  
14 ultimate determination of how the assets were divided up is  
15 set forth.

16 But too, there is some indication, and those are  
17 the Enron case and the WorldCom case. And in Enron, the  
18 Creditors received 70 percent of what they would recover  
19 without substantive consolidation from their own entity and  
20 plus 30 percent of what they would recover on a  
21 substantively consolidated basis. And guaranteed claims got  
22 a 50 percent recovery.

23 And that's a case where there were massive  
24 restatements, and you can take judicial notice of that. And  
25 the people running that entity were convicted of crimes,

1 involved in representing that entity, and you can take  
2 judicial notice of that. And yet the chance of substantive  
3 consolidation was only 70 percent, and guarantees got 50  
4 percent.

5 In contrast, here the Debtors -- Mr. Murphy,  
6 without knowledge, is asserting there's a 75 percent chance  
7 of substantive consolidation and that the enhancement for  
8 guarantee claims would only be 7.6 percent, and otherwise  
9 we'd lose the balance of the value of that.

10 Secondly --

11 THE COURT: Of course, there was a lot more money  
12 to spend in Enron than there is here on that fight.

13 MR. FOX: Well, nobody got 100 cents.

14 THE COURT: No. But there was a lot more money to  
15 spend on the lawyers for fighting that issue, ultimately.

16 MR. FOX: Well, the point there as here was to  
17 obviate that fight, was to avoid that.

18 In WorldCom, the other one where the numbers are  
19 available in the decisions, the MCI pre-merger, unsecured  
20 creditors, received 42 percent of their allowed claims, and  
21 the MCI senior noteholders recovered 80 cents on the dollar,  
22 while the WorldCom unsecured creditors got new common stock  
23 in 18 percent of their allowed claims.

24 And again, that was a case where it was so  
25 hopelessly entangled that the Debtors claimed that they

1 could not prepare schedules and statements for each of the  
2 Debtor entities. And yet here, we're being told that  
3 there's a 75 percent chance and that the recoveries should  
4 be grossly limited.

5 It -- just as a matter of fact, as a matter of  
6 equity and exercising the Court's discretion, I would argue  
7 that there's a slim, if any, case for substantive  
8 consolidation and that what's been put on the table is  
9 grossly unfair, particularly to the guarantee claimants, and  
10 that may reflect why the vote by -- apparently by those  
11 creditors seems to be overwhelmingly negative.

12 THE COURT: Well, again, the numbers voting was  
13 overwhelmingly in favor as the dollar amount was less.

14 MR. FOX: I understand that, Your Honor.

15 THE COURT: That's how Judge Funk in Winn-Dixie  
16 evaluated it in terms of numbers of those actually voting as  
17 opposed to the dollar amount.

18 MR. FOX: I understand. I would simply say that  
19 the code requires both of those things. But to the extent  
20 that we believe -- and I think we do, or Your Honor seems to  
21 -- that those voting no, to reject the plan, were holders of  
22 guaranteed claims that, I think, does reflect their view of  
23 this, their concern about this, and the adverse effect that  
24 that has on them.

25 Now, I want to just talk briefly about the PBGC



1 settlement, and then I went to get back to the plan itself.

2 The PBGC settlement currently is that they would  
3 get a \$97.5 million priority claim up from \$80 million and  
4 an \$800 million unsecured claim. The -- because of the  
5 (indiscernible) Fabricators case, which the Creditors  
6 Committee raised in their objection to the disclosure  
7 statement of the May plan, typically the view would be that  
8 the PBGC is not entitled to a priority claim. The  
9 explanation largely in this case seems to be that,  
10 nevertheless, it's an appropriate disposition of their  
11 claims because they were going to use their best efforts to  
12 cause KCD to give up its administrative claim of 140 -- of  
13 potentially \$146 million on a post-petition basis.

14 The problem is there's nothing that I can find --  
15 in the record at least, in either the Debtors' brief or the  
16 PBGC's -- that shows how the PBGC actually has the ability  
17 to control or cause KCD to actually do anything with respect  
18 to that claim.

19 So while there's the assertion that that's the  
20 case and that that's the justification, there's no  
21 indication that they're actually able to accomplish that.  
22 And our understanding is that because Transform bought those  
23 KCD notes, that if anybody had the ability to do that, it  
24 would be Transform, which we understand they did, not the  
25 PBGC.

1           So we're -- we just don't see the justification.  
2           But I think the more -- perhaps for this purpose, as I'll  
3           get to, more important point really is that the PBGC was  
4           willing to take the \$80 million claim. And, yes, they  
5           traded that when the Debtors wanted to shift to substantive  
6           consolidation. But I'll come back to that in a minute when  
7           we talk about what plan you could or should confirm.

8           We also raised issues, which I don't think I need  
9           to belabor, about the appropriate classification of the  
10          claim and whether the Plaintiff was fair and equitable  
11          giving the way -- given the way the PBGC's claim has been  
12          classified.

13          But, I mean, the fact that it's joint in several  
14          claim, so are the guaranteed claims effectively. That  
15          really doesn't make much difference.

16          The point, though, that I think ultimately you can  
17          take away from this -- and this is an important point -- is  
18          that you can actually confirm a plan today assuming you deal  
19          with the other objections -- you're comfortable the other  
20          objections have been satisfied. And that plan is the toggle  
21          plan. There's no need to approve the substantive  
22          consolidation settlement because the toggle plan can be  
23          confirmed right now.

24          Now, that plan is a pot plan, and the creditors of  
25          each Debtor entity receive their pro rata percentage based

1 on the amount that their claims against whichever entity  
2 bear to the total of all claims against all of the Debtors.  
3 So, in effect, it follows what the Debtors have been doing  
4 all along, which is to keep all their money in one place and  
5 to have claims from various entities against that particular  
6 one pot of money.

7 The difference is that the holders of guarantee  
8 claims don't see their rights decimated. So, you know, they  
9 did the right thing to make sure that they would be  
10 protected, and now that's just being taken away from them  
11 under the terms of the settlement to which they clearly have  
12 not agreed but which will have a tremendous effect on them.

13 And the entire justification for the settlement is  
14 to avoid all this litigation, which so far has not occurred,  
15 and nobody seemingly wanted it to occur. The PBGC was  
16 opposed to it. The Creditors Committee expressed their  
17 opposition to it, to substantive consolidation. The Debtors  
18 were opposed to it too until they changed their minds.

19 So I'm not sure who's out there pushing in favor  
20 of substantive consolidation. But regardless, the plan, the  
21 toggle plan, is confirmable right now without the  
22 settlement, and I would suggest that it would become an  
23 abusive discretion to approve of a substantive consolidation  
24 settlement given the fact that the toggle plan has the votes  
25 and could be confirmed.

1           So there's no real necessity at this point to  
2     approve it other than to cause harm to the guarantee claims,  
3     help a class of claimants who I think fairly knew what they  
4     were getting into, knew that the guarantees were there, knew  
5     what they were up against, knew who they were trading with,  
6     and somehow now we've decided that under the guise of a  
7     substantive consolidation settlement of a non-existent  
8     dispute that somehow they should be favored at this point.

9           Two other points. We had raised an issue about  
10    the way in which Section 9.2(a) had been drafted and whether  
11    it really carried into effect the -- at least the 7.6  
12    percent additional recovery from K-Mart guarantees.  
13    Finally, the Debtors corrected the plan, in this October 1  
14    version from last Monday, and resolved that problem.

15          The last point relates to indentured trustees'  
16    fees and how those get treated under the plan. The plan  
17    says -- and it's different than the liquidating trust  
18    agreement. So the plan says that the Debtors and the  
19    Creditors Committee will negotiate over the treatment of  
20    indentured trustees' fees, but under no circumstances will  
21    indentured trustees' fees incurred in connection with  
22    objecting to the plan, to the disclosure statement, to the  
23    sale, or a bunch of other things -- there's a laundry list -  
24    -- be paid.

25          The liquidating trust agreement then says that in

1 return for indentured trustees agreeing to make the  
2 distributions to their holders on behalf of the liquidating  
3 trust, that in payment for that service, they will be paid  
4 their fees not just for that service but all of their fees  
5 since the inception of the case -- except, however, not the  
6 laundry list of these other activities objecting to the  
7 plan, to the disclosure statement, the sale, etc.

8 If the Debtors want to pay indentured trustees the  
9 reasonable amount of their fees, we're all for it. We'd  
10 never say no. But when the Debtors start to pick and choose  
11 which activities they will or will not pay for that occurred  
12 during the case, we see that as a significant problem, and  
13 it has the potential -- we're not suggesting that that's the  
14 case here, but it certainly has the potential to cause  
15 indentured trustees to potentially temper their views about  
16 how they're going to do their jobs based on whether they  
17 will or won't get paid because of language like this.

18 And I -- we believe that Your Honor ought not  
19 start to head down that slippery slope and allow that kind  
20 of a provision to be put in the plan. If they want to pay,  
21 fine. Great. If they don't, then they don't have to. If  
22 they want to pay the reasonable fees, that's fine too. But  
23 when they start picking and choosing among specific issues  
24 that were litigated or not, then we see that as  
25 inappropriate.

1 And we would note that there are several  
2 indentured trustees on the Creditors Committee. They may  
3 well have participated -- we don't know, but they may well  
4 have participated in the determinations to cause the  
5 Creditors Committee to do those very things that the Debtors  
6 and the Committee say they don't want the Debtor to pay for.  
7 So we believe that provision should be changed.

8 But, as I said, short of that, Your Honor, we  
9 believe that Your Honor can approve a plan today, but that  
10 plan is the toggle plan. It is not the substantive  
11 consolidation settlement, which we do not believe there's  
12 either a basis for either as a matter of fact or, quite  
13 frankly, as a matter of law.

14 Thank you.

15 THE COURT: Okay. Does anyone who's objected to  
16 confirmation have anything more to say on substantive  
17 consolidation? No? So why don't we deal with that specific  
18 point with the Debtors' response?

19 MR. SCHROCK: Good afternoon, Your Honor. Ray  
20 Schrock, Weil Gotshal for the Debtors.

21 Your Honor, I'll try to take some of these just in  
22 turn in which they were made.

23 As to the arguments around the PBGC settlement  
24 that the Debtors had, you know, effectively changed their  
25 mind between February and May, there were ongoing

1 negotiations with the -- with the PBGC and, in fact, the  
2 unsecured Creditors Committee.

3 Those parties, we -- in the meantime, we were also  
4 doing the intercompany claims analysis which, as we  
5 highlighted, took approximately two and a half months just  
6 to review, you know, the majority of the post-petition  
7 period. And it became clear to us during that period that  
8 it was going to be, frankly, impossible to review the  
9 literally billions of transactions that went into -- that  
10 went into the intercompany claims pool.

11 And if I can summarize Mr. Fox's argument around  
12 the cash pool, as I heard it, I think it was because the  
13 Debtors used a centralized cash management system and  
14 consolidated their assets, they can't substantively  
15 consolidate. But I would submit to you that's the whole  
16 point. There was -- and as detailed in Mr. Murphy's  
17 declaration at Paragraphs 22, you know, there was a  
18 centralized cash management system. There was an ability  
19 for us to know if there's a net payable, you know, due and  
20 owing from the cash management system. But that's not the  
21 point. You have to know who it was due from and to in order  
22 to be able to track, you know, that analysis.

23 So as the uncontroverted testimony here supports,  
24 the intercompany balances are consolidated for all  
25 intercompany transactions recorded for each Debtor over

1 time, aggregated into one net balance of either a receivable  
2 or a payable for each Debtor that it collectively has with  
3 all the other entities, and is recorded as the net  
4 receivable or payable. That is the way this cash management  
5 system works.

6 Asking these estates with limited funds to go back  
7 and try and, you know, untangle that, frankly, we don't  
8 think that you can do it.

9 THE COURT: Well, Mr. Fox says you don't need to  
10 untangle it. You just -- you just, you know, if the cash --  
11 under the cash management system, K-Mart is owed X and Sears  
12 Roebuck is owed Y and, you know, Sears Insurance Services is  
13 owed Z, you just have the money -- again, distributions run  
14 through that system and net it out as to each estate.

15 MR. SCHROCK: That, to me, sounds like substantive  
16 consolidation. I mean, when I pull it apart, you're talking  
17 about a centralized pool of assets from which everybody has  
18 either a net payable or receivable due from. I don't  
19 understand how you can call it anything other than that. I  
20 mean, the receivables and payables were -- they were -- they  
21 were substantively consolidated for all intents and  
22 purposes. You just have -- you have to have a transaction  
23 net due and owing to the actual entity. Otherwise, I think  
24 that, you know, you're having parties act for -- as parties  
25 becomes insolvent, your acting parties act as conduits for,



1 you know, frankly, fraudulent conveyances, preferences, and  
2 a whole mess of other items that we noted in our brief and  
3 as well as Mr. Murphy noted in his declaration.

4 There's little doubt here that the creditor  
5 entanglement prong of the Augie/Restivo test is the one  
6 certainly that we found to be most prevalent here, creditor  
7 reliant. I think there were facts that were going both  
8 ways.

9 We did outline on Page 136 of our brief for  
10 several pages, you know, what some of those tos and fros  
11 are, but I will say that what's really missing from Mr.  
12 Fox's argument and was missing from the record is that  
13 Wilmington Trust had the opportunity and the ability to  
14 present contrary evidence. It is our burden to prove up the  
15 settlement within a lowest range of reasonableness, but  
16 there's nothing here as there were in other cases in which  
17 he cited about parties going and arguing that you can  
18 actually pull these entities apart. And I submit it's just  
19 not possible. You know, this is a 125-year-old company. It  
20 has been operated on a consolidated basis, as far as we can  
21 tell, forever. And certainly since it's merger with K-Mart  
22 in the early 2000s, it's been operating out of three primary  
23 entities.

24 But as to the percent chance that Mr. Murphy gives  
25 substantive consolidation, Mr. Murphy's not a lawyer. Mr.

1 Murphy takes the facts, presents those facts, and then it's  
2 up to the lawyers to make the arguments around how those  
3 facts are then applied to the law. That is what we've done  
4 in the context of this brief, and that's certainly what the  
5 parties did in negotiating the premiums that are payable on  
6 account of guarantee claims.

7 But, Your Honor, there's little doubt that the  
8 facts are here for a sub con. They're uncontroverted.  
9 There's some deposition testimony that has been highlighted,  
10 I think in a rather confusing manner, to suggest that Mr.  
11 Murphy didn't understand the nature of a sub con analysis.  
12 I think that his -- certainly his declaration suggests  
13 otherwise.

14 As to the Trustee, we're happy to have the  
15 Trustees rely, frankly, on their charging lien if that's the  
16 way the Court wants to -- wants to deal with that issue. We  
17 are -- we're also, you know, not in a position where we can,  
18 you know, go forward with a toggle plan.

19 And I think what Mr. Fox really meant on the  
20 toggle plan was confirm a plan for the Debtors that are able  
21 to, and for everybody else, I guess they liquidate and go  
22 into a Chapter 7.

23 But the -- you know, the toggle plan under -- you  
24 know, on Page 50 in Section 9.2(e) notes that in the event  
25 the bankruptcy court does not approve the plan settlement,

1 the plan shall, subject to the reasonable consent of the  
2 PBGC and the Creditors Committee revert to a joint plan of  
3 liquidation for each Debtor, a toggle plan.

4 Now, the PBGC is here. They've certainly made  
5 clear to us, and one of the reasons that we couldn't strike  
6 the deal around the non-sub con plan is because the PBGC in  
7 the Court's settlement discussions indicated that they would  
8 not consent to the toggle plan. They're the largest  
9 creditor of these estates. It's certainly something that we  
10 took into account in formulating the settlement. But I'm  
11 happy to answer any other questions the Court has.

12 THE COURT: What is -- what is or was the power of  
13 the PBGC to cause KCD to pursue the \$146 million  
14 administrative expense claim?

15 MR. SCHROCK: Your Honor, as I recall, there's  
16 three directors that are on the KCD board. The one  
17 independent director that is on KCD serves at the pledger of  
18 the PBGC. We're still working with them around getting the  
19 actual -- getting the admin claim, you know, waived. We're  
20 confident that, in fact, we will. But, you know, those are  
21 the -- you know, there's been some issues just around,  
22 frankly, just some of the legal fees that have incurred at  
23 KCD, so there's ongoing negotiations associated with that.  
24 But they've certainly been holding up their end of the  
25 bargain as to -- as to KCD. But that is a waivable

1 condition, certainly, too, to the effective date as well.

2 THE COURT: Which is?

3 MR. SCHROCK: The waiver of the KCD administrative  
4 claim.

5 THE COURT: Well, except the feasibility estimates  
6 don't have \$146 million in it.

7 MR. SCHROCK: That's correct, Your Honor. That's  
8 not our anticipation as to how that's going to play out, and  
9 we've certainly been working toward that. And, in fact,  
10 it's just a matter of time before we -- before we get that  
11 claim waived.

12 THE COURT: Okay. The other two directors have  
13 indicated that they're prepared to approve the waiver?

14 MR. SCHROCK: That's correct, Your Honor.

15 THE COURT: Okay. Okay.

16 MR. SCHROCK: Okay.

17 THE COURT: Someone behind you wants to speak.

18 MR. RAYNOR: Good afternoon, Your Honor. Brian  
19 Raynor of Locke Lord on behalf of the Pension Benefit  
20 Guaranty Corporation. I just wanted to add a little bit of  
21 flesh to the nature of the waiver.

22 Prior to the bankruptcy case, a number of Debtors  
23 and PBGC entered into agreement where PBGC was able to  
24 appoint, to identify or select one of the three managers at  
25 KCD, the independent manager. Also --

1 THE COURT: And that was part of a pre-bankruptcy  
2 settlement with the PBGC.

3 MR. RAYNOR: That's correct, but as of the  
4 bankruptcy filing and as of today, that independent manager  
5 is still there, and KCD is not a -- is not a bankrupt  
6 entity.

7 THE COURT: Right.

8 MR. RAYNOR: Also, the way the structure works is  
9 that there are essentially two creditors at KCD. One was  
10 the holder of the KCD notes, and one was Pension Benefit  
11 Guaranty Corporation by virtue of it joining several claims.  
12 So in connection with the sale, the eventual noteholders  
13 waived their claims to any admin claim that was approving at  
14 KCD, which leaves PBGC as the only entity at that claim, so  
15 there was essentially a derivative claim for the rights of  
16 the administrative expense claim at KCD, and there are  
17 definitely disputes around the bankruptcy filing as to  
18 PBGC's asserting that amount, and it was one of a number of  
19 disputes with the Debtors that was eventually settled  
20 pursuant to the PBGC's settlement.

21 And I'll also say that there have been discussions  
22 with the Debtors about making sure that that claim is  
23 waived, and those are -- assuming that the plan settlement  
24 goes effective -- that is not going to be a problem. PBGC  
25 will be lending its support to that waiver any way possible.

1 THE COURT: As the only creditor of KCD.

2 MR. RAYNOR: That's correct.

3 THE COURT: Okay. And was Mr. Schrock correct  
4 that PBGC is not consenting to the pivot, to the toggle  
5 plan?

6 MR. RAYNOR: That's correct, Your Honor. We  
7 submitted a ballot in support of the plan, but the toggle  
8 would be --

9 THE COURT: I managed to use two financial clichés  
10 in one clause, but --

11 MR. RAYNOR: That's correct, Your Honor.

12 THE COURT: Okay. All right. Thank you.

13 MR. O'NEIL: Just really quickly, Your Honor, Sean  
14 O'Neil, Cleary Gottlieb on behalf of Transform. Actually,  
15 Transform owns the KCD notes, so I just -- I just wanted to  
16 make it clear that Transform, as the holder of the KCD  
17 notes, is also a creditor of KCD. I don't -- I don't think  
18 there's any dispute about that. I just wanted --

19 THE COURT: But I thought -- well, I was just told  
20 that it's part of the sale, the right to assert that -- or  
21 to look to that claim was waived.

22 MR. O'NEIL: Correct.

23 THE COURT: Okay.

24 MR. O'NEIL: But --

25 THE COURT: So you're creditor, but you're not

1 looking to that asset.

2 MR. O'NEIL: But we've waived the -- we've said  
3 that we would do the same thing that PBGC has said it will  
4 do.

5 THE COURT: Okay.

6 MR. O'NEIL: Thank you, Your Honor.

7 THE COURT: All right.

8 MR. DUBLIN: Good afternoon, Your Honor. Phil  
9 Dublin, Akin Gump, on behalf of the Committee. I just want  
10 to touch on two points and expand on things that Mr. Schrock  
11 said, first with respect to substantive consolidation.

12 I think Mr. Fox's description of the cash  
13 management system and its impact on substantive  
14 consolidation oversimplified the issue. Each time money  
15 goes into the centralized cash management system, money then  
16 goes out somewhere. And Mr. Schrock touched on this,  
17 whether the cash management entity is a mere conduit and you  
18 have to then determine where each dollar went and who each  
19 dollar went in from and where it went to awards to determine  
20 proper intercompany claims is an issue that is being settled  
21 as part of the plan settlement.

22 And if you ignore that issue, as Mr. Schrock  
23 alluded to, when you have every entity inside the structure  
24 insolvent and you have K-Mart, for example, sending a dollar  
25 into the cash management system and the cash management

1 system sending that dollar out to Sears, Sears Roebuck, K-  
2 Mart can look through for the immediate transferee of the  
3 initial transferee to try to get back the value that it  
4 transferred out, creating fraudulent transfer claims all  
5 over the places inside of the Sears corporate structure,  
6 which creates the same intercompany conundrum as if the  
7 centralized cash management system didn't exist.

8 So I think just looking at money in and money  
9 going out and only looking at the cash management entity as  
10 to who owes money to the various entities is just not giving  
11 the proper oversight analysis with respect to the issue at  
12 play.

13 THE COURT: But you don't know who owes money to  
14 various entities. You owe -- you know what the cash  
15 management system shows the cash management system owes to  
16 each entity.

17 MR. DUBLIN: And that's the point, Your Honor. As  
18 K-Mart puts money in, that's a fraud -- that -- as a -- into  
19 the insolvent cash management entity, that's a fraudulent  
20 conveyance because it's not getting it back. It's putting  
21 100-cent dollars in, and it's getting an unsecured claim  
22 back. That's not worth the value that it put into the cash  
23 management system.

24 The cash management system then sends that dollar  
25 out to another entity inside the structure. Then K-Mart



1 would have a claim to the immediate transferee of the  
2 initial transferee, the initial transferee being the cash  
3 management entity, and the immediate transferee of the cash  
4 management entity being somebody else inside the Sears  
5 structure creating another intercompany claim.

6 THE COURT: And why wouldn't the ultimate, just  
7 netting through the cash management system itself, solve  
8 that problem, just saying that --

9 MR. DUBLIN: Because then you get the different --  
10 then you have the entity that put in the 100-cent dollar is  
11 not getting back the value for its 100-cent dollars because  
12 it's then looking -- the cash management entity is then  
13 looking to Roebuck to pay back what it owes, and Roebuck  
14 doesn't have 100-cent dollars to put back in, so you have  
15 the creditors being disadvantageous.

16 THE COURT: Or it would be collecting from one of  
17 the other ones that owes -- that is healthier.

18 MR. DUBLIN: Correct. Then you have entities all  
19 competing for that same pot of cash, and the entity that put  
20 the money in not getting back what it would otherwise be  
21 entitled to.

22 THE COURT: Okay.

23 MR. DUBLIN: On the point with respect to the  
24 Trustee's fees, that was a point that was --

25 THE COURT: It seems like it should just be the

1 charging lien.

2 MR. DUBLIN: The way it was worked out was that if  
3 the trustee wants to help with the distractions, this is  
4 what they can get. If they don't want to help out, they  
5 don't have to take it, and they can execute on their  
6 charging lien.

7 THE COURT: Well, when you say help, I mean, it's  
8 more than just makes the distributions. It's also not  
9 objecting to confirmation (indiscernible).

10 MR. DUBLIN: Exactly. And also trying to figure  
11 out where all the money goes, and working with DTC, and  
12 making all the appropriate --

13 THE COURT: So --

14 MR. DUBLIN: -- distributions to various  
15 noteholders.

16 THE COURT: Let me make sure I understand then.  
17 The Debtor is prepared to say that -- and the Committee is  
18 prepared to support not only the charging lien but also the  
19 actual distribution money being paid on top of the charging  
20 lien, for distribution services. So if they're going to be  
21 facilitating the distribution, they get paid for that up  
22 front, as opposed to a charging lien? And they have a  
23 charging lien for everything else?

24 MR. DUBLIN: Well, they would -- they would get  
25 their -- they have two things, that the indenture trustee

1 would have there to help facilitate distributions when  
2 they're actually made, and none of the money that would go  
3 to pay Trustee fees would happen (indiscernible) actually  
4 have money to make distributions.

5 One, they would be paid for their costs and expenses  
6 occurred during the case in consideration for being the  
7 disbursing agent for the trust when noteholders are entitled  
8 to distributions. And then the de minimis -- the additional  
9 costs that are incurred in actually making those  
10 distributions, they would be paid as well. Ultimately, you  
11 have a difficult construct of figuring out how you're going  
12 to make distributions to public noteholders without the use  
13 of the trustees, which they're not obligated to do.

14 And the -- if a trustee doesn't want to act as the  
15 --

16 THE COURT: But I'm sorry, just on the first point  
17 there.

18 MR. DUBLIN: Yep.

19 THE COURT: I want to make sure I understand.  
20 They get -- they get their reasonable fees and expenses from  
21 what's incurred during the case for acting as the --  
22 facilitating distributions. But that -- would that include,  
23 for example, objection to the disclosure statement?

24 MR. DUBLIN: No.

25 THE COURT: No.

1 MR. DUBLIN: It would not.

2 THE COURT: So what would it include?

3 MR. DUBLIN: It's --

4 THE COURT: Just being there to field phone calls?

5 MR. DUBLIN: And being the trust -- like the role  
6 that the Trustee plays.

7 THE COURT: Just as the normal Trustee.

8 MR. DUBLIN: Correct.

9 THE COURT: Okay.

10 MR. DUBLIN: Right, the administrative function  
11 that the Trustee plays.

12 THE COURT: Okay. So it wouldn't cover -- let's  
13 assume that instead of objecting to the plan, the indentured  
14 trustee not only didn't sit quietly but actually spent  
15 \$100,000 writing a brief in support of the plan, that  
16 wouldn't have been compensated either because that's not  
17 your normal thing?

18 MR. DUBLIN: Nobody did that --

19 THE COURT: Well --

20 MR. DUBLIN: -- so we didn't have to -- it's not  
21 an issue that had to be faced by the estate.

22 THE COURT: Okay. All right.

23 MR. DUBLIN: Thank you, Your Honor.

24 THE COURT: Okay.

25 MR. FOX: Your Honor, if I may.

1 THE COURT: Sure.

2 MR. FOX: Your Honor, there's a few of Mr.

3 Schrock's points in terms of the ongoing review. The

4 written analysis, and this is again in the deposition

5 testimony of Mr. Murphy, was finished on April 17th, which

6 is the day they filed the non-consolidation plan. Mr.

7 Murphy did testify that they continued to do some additional

8 work and basically answer questions after that. Their

9 primary analysis of the, you know, the intercompany

10 accounting was done at that time.

11 THE COURT: But that's the post-petition --

12 MR. FOX: Yes.

13 THE COURT: -- analysis? Yes.

14 MR. FOX: Yes.

15 THE COURT: Okay.

16 MR. FOX: And basically, I mean, although he said

17 they didn't actually extrapolate, that's effectively what

18 they did. There wasn't --

19 THE COURT: But to me, you are pointing to the

20 fact that one of the reasons that the parties moved to a

21 substantive consolidation plan and then a substantive

22 consolidation settlement was because of the effect of non-

23 consolidation on various Debtors where there would be a

24 larger administrative insolvency.

25 And I guess I'm less troubled by that because it

1 would seem to me that in the normal case where that doesn't  
2 pertain, you wouldn't -- you wouldn't get into these types  
3 of issues because the transfers actually do net out in 100-  
4 cent dollars whereas in an insolvency situation, they don't.  
5 Plus, what you're spending, 100-cent dollars, to fight over  
6 fractional-dollar disputes, and that doesn't make sense to  
7 me either.

8 MR. FOX: Well, I guess it depends whether they're  
9 your fractional dollars in dispute --

10 THE COURT: Well --

11 MR. FOX: -- or somebody else's.

12 THE COURT: I appreciate it's a different on the  
13 upside between 7 percent and 2 and --

14 MR. FOX: 2.7.

15 THE COURT: -- 2.7 percent or 2.77 percent. And  
16 albeit, that's a difference of \$23 million, but that's on  
17 the -- the 2.7 is, of course, a bump up from 1.85 and you're  
18 spending several million dollars to have that fight.

19 MR. FOX: Well, I would look at it this way, and I  
20 think this is -- in my view, there's a fundamental  
21 difference between this sort of a "settlement" and a  
22 settlement of a two-party dispute, if you will.

23 THE COURT: Well, no, I appreciate that, but the  
24 caselaw is clear that you can settle substantive  
25 consolidation with some people who are unhappy about it.

1 MR. FOX: Well, okay, so --

2 THE COURT: It just has to be reasonably fair.

3 MR. FOX: Well, A, I would suggest this is not,  
4 but more importantly, Your Honor, I don't think that that  
5 settlement of the issue of substantive consolidation allows  
6 the Debtors to throw in everything including -- every other  
7 problem in the case including the kitchen sink and then call  
8 it, well, substantive consolidation because that --

9 THE COURT: You mean the PBGC settlement.

10 MR. FOX: Well not just -- laying aside that for a  
11 minute, just the fact that some entities are  
12 administratively insolvent and others may not be, okay,  
13 that's a problem, but does that justify substantive  
14 consolidation? Is that one of the factors that the Second  
15 Circuit identified in Augie/Restivo?

16 THE COURT: Well, if you run out of the money --  
17 well, actually, it is identified in the cases that have that  
18 issue. The Republic case and the Winn-Dixie case both talk  
19 about cost of the litigation over substantive consolidation,  
20 rendering the whole issue academic.

21 MR. FOX: But -- well, the cost is one thing. But  
22 whether one estate is dealing with the administrative  
23 insolvency of certain Debtor entities is a whole different  
24 question.

25 THE COURT: I understand, but --

1 MR. FOX: So --

2 THE COURT: But again, it -- I mean, it's not like  
3 Kmart is rolling in dough.

4 MR. FOX: Well, by all accounts, they eventually  
5 will be and we all hope --

6 THE COURT: Well, eventually is one thing, yes.

7 MR. FOX: -- for that day.

8 THE COURT: But not in the cost of litigating  
9 these. I'm talking about today, litigating these issues.

10 MR. FOX: Well --

11 THE COURT: And --

12 MR. FOX: There was --

13 THE COURT: You say that the Court -- the Debtors  
14 can't wrap all of these problems into a settlement and I  
15 agree with that, but the PBGC settlement at this point is  
16 premised upon substantive consolidation under the plan, and  
17 if you add \$146 million of admin costs, that just --

18 MR. FOX: Well, the PBGC --

19 THE COURT: -- a deal killer.

20 MR. FOX: I don't think the PBGC settlement,  
21 despite counsel's representation, can really be used as an  
22 excuse to stay with substantive consolidation. The -- what  
23 the plan provides in 9.2E is that the PBGC would have to  
24 approve it and it would have to be reasonable, determining  
25 whether to approve it or not.



1           Given the fact that the PBGC already entered into  
2           a settlement in February -- we have signed terms sheets that  
3           are in the record agreeing to not -- in fact, they didn't  
4           want to consolidate -- for them to now say oh, we do, I  
5           think it would be a little hard for them to suggest that  
6           they're going to object to it based on -- that they would be  
7           reasonable in refusing to agree to that. If Your Honor  
8           approves the PBGC settlement separately, so be it. We can  
9           still have the toggle plan.

10           THE COURT: Well, no. They have the right to veto  
11           the toggle plan.

12           MR. FOX: They don't have an absolute right. They  
13           have to act reasonably and I'm suggesting they would not,  
14           especially given the fact they previously agreed to this  
15           and, as counsel admitted, they voted in favor of this in  
16           every class. That's the class the Debtor is relying on.

17           THE COURT: But that's circular because they voted  
18           in a situation where they have this consent right. It's not  
19           like they voted and then it could be imposed on.

20           MR. FOX: But the exercise has to be reasonable.

21           THE COURT: Well, why is it unreasonable for PBGC  
22           to say, we don't want months of litigation and several of  
23           these Debtors to go into Chapter 7?

24           MR. FOX: No, no, no. There would not be months  
25           of litigation and they would not go into a Chapter 7. You'd

1 confirm the toggle plan.

2 THE COURT: No, but the toggle plan is just --  
3 it's only for those entities, because it's an entity by  
4 entity plan.

5 MR. FOX: It's all of the --

6 THE COURT: It's only for the entities that can  
7 actually confirm the plan. I would have to have whole new  
8 hearings. I mean, the plan actually contemplates that, is  
9 that you give notice and then you have, like, the whole  
10 separate hearings or objection to the entity by entity plan.

11 MR. FOX: Well, the Debtors' confirmation brief  
12 dropped a footnote to suggest something like that, but I  
13 don't think the plan itself said --

14 THE COURT: Well, no. I think it actually is  
15 worded that way.

16 MR. FOX: Your Honor, the vote --

17 THE COURT: I mean, how could I confirm individual  
18 plans without going through the individual confirmation  
19 standards for each entity, including A9 and A11? I don't  
20 think I could.

21 MR. FOX: You -- that's right, Your Honor, but the  
22 funds -- just like the funds are available to confirm the  
23 consolidated plan, the same funds are available. Instead of  
24 being gifted, they'd be lent as -- the plan provides that  
25 the solvent entities would lend to the insolvent in order to

1 get this done. There are --

2 THE COURT: And how do we know which is which,  
3 then? So we're back to that same litigation again.

4 MR. FOX: No, it's not litigation. They'd either  
5 have the funds at the effective date to make the payment of  
6 the administrative expense --

7 THE COURT: I can pretty much guarantee you that  
8 when each individual case was noticed for confirmation,  
9 there would be someone equally talented as you on the other  
10 side saying, my Debtor is actually a net winner when you do  
11 the analysis. And they're going to be paying me, not Kmart.

12 MR. FOX: If they can make that case, God bless  
13 them, but I don't --

14 THE COURT: Well, that's the point is that --

15 MR. FOX: No --

16 THE COURT: -- we'll be spending all the next  
17 several months doing that with the litigation costs when \$1  
18 or \$2 million in the settlement means a lot.

19 MR. FOX: Your Honor -- well, losing 60 percent of  
20 what would otherwise be one's recovery means a lot and --

21 THE COURT: Well --

22 MR. FOX: -- and the --

23 THE COURT: If you assume that that's actually  
24 what you would recover.

25 MR. FOX: Well, based on -- well, we're all basing

1 everything on the Debtors' assumptions. Now, if the  
2 Creditors' Committee hits a home run, then maybe it'll be a  
3 lot more than the Debtor assumed and lower percentages will  
4 nevertheless not matter. The toggle plan itself, just to be  
5 clear, it's a pot plan to begin with and it -- and the  
6 Debtors effectively lend to each other to make sure they're  
7 all administratively -- to pay their administrative  
8 expenses.

9 In effect, it contains elements of substantive  
10 consolidation already. We're not challenging that. But  
11 this is just -- the sub con settlement is just a bridge too  
12 far. It's wildly excessive, particularly under these  
13 circumstances. Now, let me just move on because I  
14 appreciate the opportunity to respond to the points.

15 The point about the netting and Mr. Schrock said  
16 that the Debtors can't determine who owes what to whom, the  
17 point again is, you don't need to. And in fact, the toggle  
18 plan, the pot plan, you don't need to, either because  
19 everybody's just getting out of the pot. The fact --

20 THE COURT: But, again, in fact you just said it.  
21 That's in essence, a substantive consolidation.

22 MR. FOX: No, well, what it really does --

23 THE COURT: On the asset side.

24 MR. FOX: Well, you could view it that way, but  
25 effectively what it does is follows exactly the way the

1 Debtors ran their business and the way everybody did  
2 business with the Debtors. It's, in a sense, the fairest  
3 way because it follows what was going on and what everybody  
4 was dealing with. The --

5 THE COURT: But it's a black box, so how could you  
6 say everyone was dealing with it? It's a black box. It  
7 goes in. Everyone was dealing with it on the assumption  
8 that each of these entities would be good for the whole  
9 amount.

10 MR. FOX: That's why people extend credit.

11 THE COURT: So they didn't account for each  
12 transaction as to who benefitted from what. But now that it  
13 matters, it seems to be that a more nuanced approach is  
14 appropriate, which is what they've come up with.

15 MR. FOX: Well, what they've come up with is an  
16 approach that takes it all out of the guarantee claims.

17 THE COURT: Well, it gives the guarantors  
18 something.

19 MR. FOX: Not much.

20 THE COURT: Well --

21 MR. FOX: And it doesn't even reflect if there's a  
22 25 percent chance. It doesn't even reflect that. And  
23 compared to 50 percent in Enron, I mean --

24 THE COURT: I'm sorry, why doesn't it reflect the  
25 25 percent?

1 MR. FOX: Well, it's a 7.6 percent enhancement.  
2 If you have -- for a Kmart guarantee claim, now that they  
3 fixed the plan.

4 THE COURT: Well, it goes --

5 MR. FOX: 9.2(a)(7), I think.

6 THE COURT: It goes from -- I'm sorry, from 7.7 to  
7 11.6?

8 MR. FOX: I'm not sure what you're looking at,  
9 Your Honor.

10 THE COURT: The recovery.

11 MR. FOX: Oh, the disclosure statement?

12 THE COURT: Well, the various charts. They're all  
13 basically the same, but it -- before the settlement, the  
14 recovery by the non-ESL guarantee claims would be \$7.7  
15 million projected and under the settlement, it goes to 11.6.  
16 So that's a little over \$4 million.

17 MR. FOX: Well, I'm not sure how they came up  
18 that. As I say, the --

19 THE COURT: Well, the --

20 MR. FOX: -- plan itself provides for the 7.6  
21 percent enhancement on the recovery. So putting aside the  
22 dollar amount, that's the enhancement to negate the adverse  
23 impact on the guarantee claims that we have against Kmart  
24 that we would lose. That's what the plan provides. I can't  
25 speak to their analysis. And their analysis makes various

1 assumptions.

2 THE COURT: I'm sorry. Under a deconsolidated  
3 plan, it's a little under \$31 million, is the recovery.  
4 They discount that by 75 percent to \$7.7, so they are giving  
5 you the 25 percent. You don't think of it as a gift, but  
6 they're giving you the 25 percent and then they're adding on  
7 top of that \$3.9 million which is about 10 percent more of  
8 the \$30.9 million, a little over that, 11 percent more.

9 MR. FOX: Yeah, I'm not sure how they --

10 THE COURT: So totally -- so the total amount is  
11 like 33 -- I'm sorry, 36 percent recovery.

12 MR. FOX: Your Honor, I'm not sure how -- I don't  
13 have that in front of me. I'm not sure how you're getting -  
14 -

15 THE COURT: Well, I mean, I think that --

16 MR. FOX: But I --

17 THE COURT: I mean, that's -- I think I'm doing  
18 the math right.

19 MR. FOX: That may be. All I'm saying is that  
20 when you look at the plan itself in 9.2(a)(vii), the  
21 enhancement is you get, then, 7.6 percent of your recovery  
22 on account of your guarantee claim. You don't get 25 --

23 THE COURT: Oh, well, yeah, because you're not  
24 expected to get anything anyway. I mean, you expect to get  
25 a very little amount, but the enhancement isn't -- I mean,

1 I'm just focusing on the fact that you're saying that the  
2 bump up here is miniscule. Maybe in terms of dollar amount  
3 it is small, but you're talking about small projected  
4 recoveries anyway because the Debtors are being conservative  
5 here on litigation recoveries and again, it's a 25 percent  
6 recovery and then you add another 10 percent onto what you'd  
7 be getting under a consolidated plan.

8 MR. FOX: Well, as I said, I was referring to the  
9 percent of the -- recovery percentages. If I could, I just  
10 want to address the last points about the Trustee's fees  
11 that Mr. Dublin raised. In order for a Trustee to exercise  
12 his charging lien, it must make the distribution.

13 THE COURT: Right.

14 MR. FOX: Otherwise, it can't assert.

15 THE COURT: Right.

16 MR. FOX: And it's entitled under the rules to  
17 receive the distribution for exactly that purpose.

18 THE COURT: Right.

19 MR. FOX: So --

20 THE COURT: No, but they're prepared to pay on top  
21 of your charging lien, so you don't have to hold back the  
22 distribution -- it's really for the benefit of the  
23 noteholders -- your distribution charges.

24 MR. FOX: Yeah.

25 THE COURT: Your normal charges --



1 MR. FOX: We --

2 THE COURT: -- for being an indentured Trustee, so  
3 that's on top of the charging lien.

4 MR. FOX: Right. Well, ordinarily the fees to  
5 actually do the distribution or charge separately to the  
6 estate --

7 THE COURT: No --

8 MR. FOX: -- and they're paid. But what the  
9 Debtor -- what the plan and the liquidation trust agreement  
10 provide is much more than that.

11 THE COURT: I understand, and I don't -- I agree  
12 with you. I think the deathtrap aspect of it isn't  
13 appropriate, but I will interpret that provision to say that  
14 if the Trustee just does its normal duties, the noteholders  
15 won't be charged for those through the charging lien.  
16 They'll pay you directly for that so that every dollar that  
17 you get after that you can pay them or assert some other  
18 charging lien for whatever else you've got in the case.

19 MR. FOX: So it's just the actual distribution  
20 cost --

21 THE COURT: Well, I don't know if it's that. I  
22 mean, there may be other things your client did during the  
23 case, like field phone calls or keep lists or, I don't know.  
24 I don't know what else to --

25 MR. FOX: Right.

1 THE COURT: Indentured Trustees normally get paid  
2 a ridiculously low amount of money for those types of  
3 things, so I'm assuming it's not a lot, but maybe they do  
4 something. I don't know.

5 MR. FOX: Well, okay, because the language that's  
6 in the --

7 THE COURT: But --

8 MR. FOX: -- now is not that --

9 THE COURT: I agree with that.

10 MR. FOX: That's everything they did. If they  
11 spent 1,000 hours reading every document that was filed --

12 THE COURT: I agree.

13 MR. FOX: -- but never took a position, the plan  
14 and the liquidation trust agreement would pay them for all  
15 of that work.

16 THE COURT: Well, that doesn't make sense.

17 MR. FOX: Well, that's what it provides.

18 THE COURT: Okay. All right.

19 MR. FOX: Thank you, Your Honor.

20 THE COURT: Okay.

21 MR. SCHROCK: Your Honor, just really quickly for  
22 the record. I think it's important to note that when  
23 Wilmington Trust makes these arguments, as they noted,  
24 they're making for the 2L notes which are payments  
25 subordinated, the \$89 million that's at the bottom tranche,

1 so as you may recall --

2 THE COURT: So the recoveries are going to be low  
3 to begin with.

4 MR. FOX: Your Honor --

5 THE COURT: They're subordinated as liens and to  
6 other debt, but --

7 MR. FOX: Only the liens are subordinated.

8 THE COURT: Yeah.

9 MR. FOX: The debt is not.

10 THE COURT: But we're talking about projected low  
11 recoveries for all unsecured creditors.

12 MR. FOX: Right.

13 THE COURT: So to complain that it's only a 7.7  
14 percent recovery, it's lower for the other unsecured  
15 creditors by about 50 percent of that, so it's not -- I  
16 think you're mixing apples and oranges, Mr. Fox, as far as  
17 the bump up as part of the sub con settlement is concerned.  
18 No one else has a substantive consolidation issue? I don't  
19 think so. All right. I...

20 MR. KRELLER: Your Honor, Thomas Kreller from  
21 Millbank, LLP for Cyrus Capital.

22 THE COURT: Okay.

23 MR. KRELLER: I actually do have a few other  
24 issues.

25 THE COURT: No, I know, but I'm wondering if you

1 have a substantive consolidation --

2 MR. KRELLER: I don't have a substantive --

3 THE COURT: Okay. So I'm going to rule on that  
4 issue now. I have before me in the plan a proposal under  
5 which -- under the plan the Debtors would be substantively  
6 consolidated under the Court's general equitable powers,  
7 which is well recognized in the Second Circuit including In  
8 RE: Augie/Restivo Baking Company, Limited, 860 F.2d. 515,  
9 518 Note 1 (Second Circuit, 1988).

10 Substantive consolidation is the effect of  
11 consolidating the assets and liabilities of multiple Debtors  
12 and treating them as if the liabilities were owed by and the  
13 assets held by a single legal entity. In the course of  
14 satisfying the liabilities of the consolidated Debtors form  
15 the common pool of assets, other company claims are  
16 eliminated and guarantees from co-debtors -- unsecured  
17 guarantees, that is -- are disregarded.

18 In RE: Republic Airways Holdings, Inc., 565 B.R.  
19 710, 716 (Bankruptcy S.D.N.Y. 2017) and In RE: WorldCom,  
20 Inc., 2003 Bankruptcy Lexus 1401 (Bankruptcy S.D.N.Y.  
21 October 31, 2003).

22 While the Court has considerable discretion in  
23 ordering substantive consolidation, the Circuit has made it  
24 clear that the power should be used sparingly because of the  
25 possibility of unfair treatment of creditors who have dealt

1 solely with that Debtor without knowledge of its  
2 interrelationship with others. Chemical Bank, New York  
3 Trust Company v. Kheel, K-H-E-E-L, 369 F.2d. 845, 847  
4 (Second Circuit 1966).

5 Courts apply multiple factors in determining  
6 whether substantive consolidation is appropriate but the  
7 Circuit in Augie/Restivo distilled those considerations into  
8 two primary or critical inquiries phrased in the  
9 disjunctive, i.e., whether "creditor dealt with the entities  
10 as a single economic unit and did not rely on their separate  
11 identity in extending credit," or separately, the affairs of  
12 the Debtors are so entangled, consolidation will benefit all  
13 creditors. Augie/Restivo, 860 F.2d. 518.

14 Substantive consolidation, given its equitable  
15 basis is not a black and white or all or nothing result.  
16 The Courts look at whether the proposed consolidation will  
17 yield an equitable treatment of creditors without any undue  
18 prejudice to any particular group, In RE: Food Fair Inc.,  
19 10 B.R. 123, 127 (Bankruptcy S.D.N.Y. 1981) and Republic  
20 Airways Holdings, 585 B.R. at 716 and should apply the  
21 remedy in a practical manner.

22 Thus, it quoted, "It is well accepted that  
23 substantive consolidation is a flexible concept and that a  
24 principal question is whether creditors are adversely  
25 affected by consolidation, and if so, whether the adverse

1 effects can be eliminated or otherwise dealt with," id.,  
2 Page 717.

3 It is also the case, consistent with the point I  
4 just made that substantive consolidation can be proposed in  
5 the form of a settlement of substantive consolidation issues  
6 or issues pertaining to substantive consolidation under  
7 Bankruptcy Rule 9019 and there are numerous cases that apply  
8 the substantive consolidation in the context of a related  
9 settlement analysis that is applying the so-called iridium  
10 factors or TMT Ferry factors applicable to analysis of a  
11 proposed settlement as set forth in In RE: Iridium  
12 Operating, LLC, 478 F.3d. 452, 462, citing among other  
13 cases, In RE: TMT Trailer Ferry, 390 U.S. at 424.

14 In the substantive consolidation context, in  
15 addition to the Republic Airways case that I've previously  
16 cited, such an approach applying a settlement analysis as  
17 well as substantive consolidation analysis was undertaken in  
18 In RE: Winn-Dixie Stores, 356 B.R. 239 (Bankruptcy N.D.  
19 Florida 2006) as well as in a number of reported and  
20 unreported decisions cited in the Debtors' brief -- reply  
21 brief in support of substantive consolidation, albeit that  
22 those settlements did not have extensive analysis.

23 They include, though, In RE: WorldCom, Inc. that  
24 I previously cited as well as the Enron confirmation ruling  
25 that is cited in the Debtors' reply memorandum where a

1 substantive consolidation analysis which at the confirmation  
2 hearing took up a lot of time and argument, was resolved on  
3 a consensual basis except for some relatively modest  
4 remaining objections and dealt with in about a page-and-a-  
5 half of a 200-page decision.

6 Obviously, in approving or in considering a  
7 settlement, particularly in the context of substantive  
8 consolidation being among the settled issues, the Court  
9 needs to ensure that the settlement isn't unduly at the  
10 expense of a party or parties who are not on board with the  
11 settlement and who are affirmatively objecting to it.  
12 Nevertheless, I can clearly approve a settlement where not  
13 every affected creditor consents.

14 That's the case under the substantive  
15 consolidation caselaw as well as the settlement caselaw,  
16 even where a class does not accept a settlement. Again, see  
17 In RE: Winn-Dixie Stores, 356 B.R. at 249.

18 The settlement here is complicated by the fact  
19 that it is not only a proposed settlement of substantive  
20 consolidation issues, or issues pro and con in favor of  
21 substantive consolidation, but also incorporates a complex  
22 settlement between the Debtors and the PBGC, their largest  
23 creditor.

24 That settlement as originally proposed by the  
25 Debtors and PBGC in a terms sheet did not contemplate

1 substantive consolidation, but as ultimately proposed, while  
2 it contains or contemplates the possibility of a non-  
3 substantive consolidation plan, i.e., the so-called toggle  
4 plan, a switch to the toggle plan requires the consent not  
5 to be unreasonably withheld of PBGC and the Official  
6 Unsecured Creditors' Committee which joined in the PBGC  
7 settlement in its ultimate version.

8 The PBGC in the settlement substantially  
9 compromises its claims and looks for one consolidated  
10 recovery. In addition, and importantly here, the PBGC  
11 agrees to use its best efforts to cause a non-Debtor  
12 subsidiary of the Debtors, KCD, not to pursue a \$146 million  
13 administrative expense claim against the Debtors.

14 I believe on the record before me, it is clear  
15 that PBGC not only has the requisite influence to cause that  
16 to occur given that the independent director of KCD was  
17 subject to the nomination by PBGC and PBGC is currently the  
18 only creditor of KCD that would have an interest through KCD  
19 in such a claim or on KCD pursuing such a claim. Clearly,  
20 if PBGC, as is stated on the record today, informs KCD's  
21 board that it has no desire to have KCD collect on their  
22 claim, it's highly likely that the KCD board would not  
23 pursue the claim.

24 The record of this confirmation hearing generally  
25 makes it clear that the Debtors' current cash position would



1 not let them emerge from bankruptcy until various events  
2 occur in the future that would enable them to pay allowed  
3 administrative expenses in full or as agreed by the  
4 administrative expense creditors holding allowed  
5 administrative expenses, in compliance with Section  
6 1129(a)(9) of the Bankruptcy Code. That is the case even  
7 without a \$146 million administrative expense claim.

8 To add that administrative expense onto the  
9 Debtors' balance sheet would raise very serious feasibility  
10 issues for these Debtors, in all likelihood causing most and  
11 perhaps all of them, including the entity that apparently  
12 the objector, Wilmington Trust, looks to most prominently,  
13 the Kmart Debtors, to be rendered administratively  
14 insolvent.

15 So the PBGC settlement is important. It appears,  
16 based on the record before me, that the final version of  
17 that settlement was negotiated with the administrative claim  
18 position of these cases or these Debtors well in mind. I  
19 believe that was a good faith and rational and reasonable  
20 basis for the negotiation of the settlement and that the two  
21 are, in fact, properly linked, that is the substantive  
22 consolidation settlement and the PBGC settlement.

23 PBGC's counsel has represented that it is not  
24 prepared to waive its right to object to switching to a  
25 debtor-by-debtor so-called toggle plan and given the facts

1 before me, that insistence does not appear to me to be  
2 unreasonable.

3 In evaluating a settlement, the Court considers,  
4 as laid out by the Second Circuit in Iridium and WorldCom  
5 and TMT Trailer Ferry, one, the balance between the  
6 litigation's possibility of success and the settlement's  
7 future benefits, the likelihood of complex and protracted  
8 litigation with its attendant expense, inconvenience, and  
9 delay, including the difficulty in collecting on the  
10 judgment, the paramount interests of the creditors including  
11 each affected class's relative benefits and the degree to  
12 which creditors either do not object to or affirmatively  
13 support the proposed settlement, whether other parties in  
14 interest support the settlement, the competency and  
15 experience of counsel supporting and the experience and  
16 knowledge of the Bankruptcy Court judge -- well, this is on  
17 appeal, obviously -- reviewing the settlement, the nature  
18 and breadth of releases to be obtained by officers and  
19 directors and the extent to which the settlement is the  
20 product of arm's length bargaining.

21 Obviously, in any multifactor test, certain  
22 factors simply don't apply and some factors may, under the  
23 particular -- or in the particular context, be more  
24 important than others. In addition, as laid out by the  
25 Iridium Court, the paramount determination in reviewing the

1 settlement, if this issue exists, is whether the settlement  
2 violates some other fundamental principle of the Bankruptcy  
3 Code including, as was the case in Iridium, the fair and  
4 equitable absolute priority rule.

5 That does not appear to me to be the case here, so  
6 I will look at the other factors in the context of  
7 substantive consolidation analysis. It is clear to me that  
8 there is a material, legitimate dispute that good lawyers  
9 could pursue for a long and expensive time over whether  
10 these Debtors should be substantively consolidated or not.  
11 Frankly, it does not appear to me that the first of the two  
12 Augie/Restivo prongs raises much of an issue.

13 At least while these Debtors were solvent, the  
14 creditors dealt with them on an independent basis, by and  
15 large, including Wilmington Trust where there were separate  
16 guarantees of the notes for which Wilmington Trust is the  
17 Trustee as well as trade creditors who had agreements with  
18 specific Debtor entities.

19 On the other hand, the Debtors had a fundamentally  
20 fairly simple cash management system where their receipts  
21 were swept on a daily basis into a concentration account, in  
22 essence consolidated, and only net balances were maintained  
23 so you would have multiple Debtors contributing or borrowing  
24 from the concentration account without any easily  
25 implemented way to determine which Debtors could, in effect,

1 be said to be making transfers to which other Debtors and  
2 vice versa.

3 It is clear to me from Mr. Murphy's declaration  
4 that tracing those types of transactions between the  
5 entities as opposed to a net amount owing to the group would  
6 be complex, lengthy, and very expensive, and ultimately  
7 fraught with uncertainty.

8 Even in the two-and-a-half months spent in tracing  
9 post-petition transactions on a debtor-by-debtor basis, Mr.  
10 Murphy testified credibly that he had only a 80 to 90  
11 percent level of confidence that that tracing was accurate  
12 and, of course, that was an expensive and lengthy process  
13 just for the slightly under one-year period of this case,  
14 although at that time it was, I guess, probably about 10  
15 months or even shorter since I believe it was completed in  
16 May.

17 That problem highlights the very real likelihood  
18 that in a fully contested substantive consolidation case,  
19 the second prong in the Augie/Restivo analysis, which again,  
20 is an independent basis for substantive consolidation, would  
21 be found. Again, although that prong is sometimes loosely  
22 referred to in briefs and even in some cases as requiring an  
23 impossibility of disentangling the corporate affairs, that's  
24 not how the Circuit phrases it. Again, it's phrased as the  
25 affairs of the Debtors are so entangled, consolidation will

1 benefit all creditors.

2 And it is clear that where the Court believes that  
3 the cost of conducting such an investigation,  
4 reconciliation, and audit will be prohibitive in the context  
5 of the case, the Court will approve a reasonable substantive  
6 consolidation settlement. See In RE: Republic Airways  
7 Holdings, 565 B.R. at 719 and In RE: Winn-Dixie Stores at  
8 Page 750 -- I'm sorry, 356 B.R. at Page 250.

9 Again, the context here is not something that,  
10 when the parties dealt with -- when the creditors dealt with  
11 these Debtors pre-bankruptcy, they reasonably contemplated,  
12 which is that there would be such a thin margin on  
13 administrative expense solvency that enforcing intercompany  
14 claims debtor by debtor as opposed to simply netting out  
15 those claims through the cash management system against an  
16 overall solvent business would be meaningful.

17 It appears to me, therefore, that settling  
18 substantive consolidation issues on an assumption that it  
19 would be likely on a 75 percent basis that the Court would  
20 ultimately direct substantive consolidation is reasonable in  
21 light of the Iridium factors pertaining to the costs, risks,  
22 and delay of litigation.

23 The parties negotiating the settlement were  
24 clearly fiduciaries for all the Debtors as well as the  
25 Debtors unsecured creditors, on the one hand, that is, the

1 Debtors themselves and the Unsecured Creditors' Committee  
2 and the PBGC on the other, the Debtors' largest creditor and  
3 also a member of the Creditors' Committee.

4 I believe not only were the professionals  
5 negotiating that substantive consolidation settlement  
6 capable and experienced, but actually acting in good faith  
7 and respect of all the Debtors including Debtors that could  
8 make an argument that they would be unduly harmed by the  
9 substantive consolidation.

10 The plan went out for a vote and generally was  
11 accepted, but there are classes of unsecured creditors of  
12 certain Debtors that have rejected the plan under Section  
13 1129(a)(8) on the dollar threshold; although, as set forth  
14 in the ballot declarations, in terms of numbers of those  
15 voting, the majority -- actually, a super majority in each  
16 rejecting class -- accepted the plan. So at best, it  
17 appears to me that the paramount interests of creditors and  
18 their support of the settlement, at best for Wilmington  
19 Trust, is neutral.

20 No other creditor has objected to substantive  
21 consolidation; although, of course, Wilmington Trust is  
22 speaking as an indentured Trustee for a group of creditors,  
23 some of whom, however, are very well-heeled and have not  
24 made their own separate objection. And the creditors in the  
25 rejecting classes in terms of numbers of those voting,

1 again, have by a large majority accepted the plan which was  
2 a factor that the Winn-Dixie Stores opinion took into  
3 account as a positive, 356 B.R. at 249 through 250.

4 As I noted, substantive consolidation being an  
5 equitable remedy and a flexible concept, the Court has the  
6 power to approve adjustments to substantive consolidation  
7 that would relieve those who would otherwise be unduly  
8 prejudiced by the consolidation of, at least, the undue  
9 amount of the prejudice. That is the case under this plan  
10 which provides that certain holders of claims at estates  
11 that appear to be more solvent than others will have a bump-  
12 up in their recovery.

13 That chart is laid out in the Debtors' reply  
14 memorandum as well as Mr. Murphy's declaration. As a  
15 percentage matter, the bump-up is meaningful and I believe  
16 when taking into account the relatively modest recoveries of  
17 all unsecured creditors that are projected and the benefits  
18 of the interlinked PBGC settlement, particularly the KCD  
19 resolution which would, if not approved, substantially  
20 reduce down to nearly nothing the recoveries by the bump-up  
21 creditors against their then deconsolidated, more solvent  
22 Debtors.

23 The bump-up is sufficient to adequately protect  
24 creditors that have multiple sources of recovery that would  
25 have those sources eliminated or reduced to one under a

1 strict substantive consolidation plan. Again, the  
2 alternative would be, I believe, a necessity to open up  
3 confirmation for individual Debtors on a debtor-by-debtor  
4 basis which then would require as part of the 1129(a)(9) and  
5 1129(a)(11) feasibility analyses to do an analysis on a  
6 debtor-by-debtor basis of intercompany claims.

7 And by intercompany claims, I don't mean claims  
8 against the common pot through the consolidation account,  
9 but rather a debtor-by-debtor, transfer-by-transfer  
10 analysis. I believe that would be prohibitively expensive  
11 based on the facts before me and the Debtors' current cash  
12 positions on a debtor-by-debtor basis.

13 As far as the prohibitively expensive aspect of  
14 it, there is no dollar estimate of what it would cost, but I  
15 do accept as credible Mr. Murphy's testimony that based on  
16 the two-and-a-half months' effort to do such an analysis  
17 with respect to the post-petition period, to do a  
18 comprehensive analysis on the prepetition period would be  
19 extremely expensive, and prohibitively so given the Debtors'  
20 cash position.

21 It would, to my mind, simply lead to another  
22 settlement after all of the estate's assets would be reduced  
23 and the KCD claim laid on top of the Debtors' balance  
24 sheets, which would benefit no one. Given the ultimate  
25 flexibility that I have based on an across the board benefit



1 analysis, it appears to me, therefore, under the caselaw  
2 that the substantive consolidation/PBGC settlement is  
3 warranted here, so I will deny Wilmington Trust's objection  
4 on that basis.

5 Wilmington Trust also objected on the grounds that  
6 separately classifying the PBGC violated Section 1122 and  
7 1123 of the Bankruptcy Code and/or arguably meant that the  
8 plan was not being pursued in good faith under Section  
9 1129(a)(3). I find, to the contrary, that given PBGC's  
10 unusual rights against the Debtors and its power with  
11 respect to KCD, it was entirely reasonable and appropriate  
12 to classify it separately. Lumping it in with other  
13 unsecured creditors would've, in fact, skewed those classes.

14 Indeed, it appears to me, given the size of PBGC's  
15 claims, it may have well results in the rejecting classes  
16 voting in favor of -- being deemed to have voted in favor of  
17 the plan in certain of the Debtor entities, which wouldn't  
18 have been right anyway, given PBGC's unique position in the  
19 case, including its rights, explicit and implicit, with  
20 respect to KCD. Given that it was properly classified, the  
21 1129(a)(3) objection would not fly, either.

22 Finally, Wilmington Trust objects to a provision  
23 in the plan which is somewhat differently worded in the  
24 liquidation trust agreement regarding the payment of its  
25 reasonable fees and expenses. Frankly, to my mind, there is

1 some confusion on how those provisions work. It is clear to  
2 me, however, that both sides agree that Wilmington can be  
3 limited to its charging lien and that the Debtors' estates  
4 do not have to separately in a legal manner pay its fees and  
5 expenses.

6 I think the confirmation order should be made  
7 clear that under the plan, the Debtors' estates will pay  
8 Wilmington Trust's legal fees and expenses regardless of  
9 whether it opposes any action that the Debtors take, but  
10 that such payment shall be only in the discretion of the  
11 Debtors and the Debtors can limit such payment to the  
12 ordinary and customary work that an indentured Trustee does  
13 outside of a bankruptcy case, including in facilitating  
14 distributions and answering questions.

15 The reason for that limitation is that I think it  
16 is -- there should be no question that an indentured Trustee  
17 should feel free to raise any legitimate objection or make  
18 any legitimate statement in support of an action by a Debtor  
19 in bankruptcy and should not be forced to decide whether to  
20 do so based on whether its fees will be paid or not by the  
21 Debtors' estate.

22 Okay. So I think we have, then, Cyrus.

23 MR. KRELLER: Good afternoon, Your Honor. Thomas  
24 Kreller of Millbank, LLP on behalf of Cyrus Capital  
25 Partners.

1 THE COURT: Afternoon.

2 MR. KRELLER: Your Honor, just for -- just as a  
3 reminder, Cyrus is the holder of unsecured claims in the  
4 approximate amount -- in something like \$600 million against  
5 various Debtors. By virtue of those claims, I believe Cyrus  
6 is next to PBGC, the biggest unsecured creditor in these  
7 cases. We also have a disputed 507(b) claim, disputed and  
8 under appeal from your ruling disallowing that claim.

9 Your Honor, I'll be relatively brief, recognizing  
10 that at least most of the horse just left the barn. We --

11 THE COURT: Well, again, you -- I asked you.  
12 You're not -- you didn't deal with substantive  
13 consolidation, so you're -- I haven't dealt with your issues  
14 yet.

15 MR. KRELLER: I understand that, Your Honor.

16 THE COURT: Okay.

17 MR. KRELLER: But clearly, the approval of those  
18 settlements, it leads a long way towards confirmation.

19 THE COURT: Right.

20 MR. KRELLER: That's my only point.

21 THE COURT: Okay.

22 MR. KRELLER: And so I'm not going to belabor  
23 those particular arguments. I do want to state, for the  
24 record, our objections still stand, and notwithstanding our  
25 attempting to work with the Debtors and others on language

1 in the confirmation order that are under discussion, some  
2 points I'll talk about, our doing so doesn't constitute a  
3 withdrawal of our objection. Our objections still stand,  
4 Your Honor. We don't believe this plan should be confirmed.  
5 We think the estates are hopelessly administratively  
6 insolvent and likely will be at least for a very long time.

7 The plan -- this plan is not the simple waterfall  
8 plan that Mr. Schrock has been touting for months now. It  
9 has become a bit of a Frankenstein monster with various  
10 funds being diverted in various directions that are not  
11 necessarily consistent with a simple waterfall plan. And,  
12 Your Honor, I'd note, obviously already you've approved the  
13 PBGC settlement and the substantive consolidation  
14 settlement, so I won't get into the how the effects of  
15 those, a bit of a shell game going there on some of that  
16 stuff, but the other --

17 THE COURT: Well, if it's a shell game, you  
18 should've raised the issues. I'm going to say it again. Do  
19 you really want to go over it? I mean, do you have new  
20 facts to raise on those issues?

21 MR. KRELLER: No, I don't, Your Honor.

22 THE COURT: So what's the -- so how is it a shell  
23 game?

24 MR. KRELLER: Your Honor, the other piece of the  
25 diversion of funds is the \$25 million that's going out to

1 essentially serve as a retainer for the Committee  
2 professionals and that UCC settlement as well is a bit  
3 suspect because all that was really resolved there was which  
4 law firm was going to represent the Trust in the litigation  
5 and --

6 THE COURT: It's not a big settlement as far as  
7 I'm concerned, although it's important to get done. I agree  
8 with that.

9 MR. KRELLER: Well, Your Honor, well -- I want to  
10 talk about the \$25 million in a minute. It's not a big  
11 settlement. It certainly doesn't appear to have had any  
12 benefit for the creditors or their recovery. The  
13 beneficiary of that settlement appears to be Akin Gump.

14 THE COURT: Wait, the \$25 million or --

15 MR. KRELLER: Yes.

16 THE COURT: -- so, you stated -- is that even in  
17 your objection? I don't think you raised that in your  
18 objection.

19 MR. KRELLER: I don't know that I did, Your Honor.

20 THE COURT: No, you didn't.

21 MR. KRELLER: But the --

22 THE COURT: So what is the point? I mean, you're  
23 saying that the Debtors should not have a litigation fund to  
24 pursue their complaint?

25 MR. KRELLER: I'm not saying that, Your Honor.

1 I'm saying --

2 THE COURT: Okay.

3 MR. KRELLER: -- that those funds coming out of  
4 the estate ahead of potentially administrative claimants  
5 isn't appropriate and I would question the magnitude of that  
6 fund given the fact that the work has already been done and  
7 paid for twice by the estates to both the UCC's  
8 investigation and the special committee of the board's  
9 investigation.

10 But, Your Honor, I'm not standing her to belabor  
11 any of these points.

12 THE COURT: Well, good, because they're not in  
13 your objection.

14 MR. KRELLER: You have your record. You've made  
15 the assessment. Apparently, the Debtors have cleared the  
16 lowest rung on the range of reasonableness and so I'll move  
17 on, Your Honor. The point that I really want to address is  
18 kind of the metaphysical question that you were dealing with  
19 a bit on Thursday and less so today which is, what happens  
20 when you have a confirmed plan that may not go effective for  
21 a prolonged period of time, and I think that's the upshot of  
22 even the Debtors' own testimony on there.

23 I don't believe any of their witnesses could give  
24 you any real sense of how long it would be before there  
25 would actually be funds sufficient to pay the administrative

1 claims, so Your Honor, my view is it's probably closer to  
2 three years than three months, but that will be what it will  
3 be.

4 The issue of a confirmed but not yet effective  
5 plan, though, Your Honor, gives rise to a handful of issues  
6 and these really come up in the proposed confirmation order  
7 and we've been discussing these with Debtors' counsel and we  
8 have -- I think we've had agreement on a couple and we still  
9 have some outstanding, but I think they're important. Your  
10 Honor, when the plan is confirmed but not yet effective,  
11 nothing really changes in terms of the Debtor. The Debtor  
12 is a Debtor in Possession. The plan is not actionable or  
13 implementable and the parties simply wait in the status quo,  
14 waiting for the effective date.

15 That leaves the Debtors remaining as Debtors in  
16 Possession. It leaves the UCC in place with its rights and  
17 duties and the case, essentially, proceeds as it is with  
18 ordinary course transactions being permitted under the code,  
19 but anything outside the ordinary course or any  
20 extraordinary creditor distributions to await the effective  
21 date of the plan.

22 That structure, that confirm and wait for  
23 effective date the Debtors have proposed conceptually works  
24 and occurs in other cases, but the notion there is that  
25 essentially the money doesn't start moving until the

1 effective date occurs because you don't have an effective  
2 plan. Now, in the administrative expense settlement that  
3 got announced earlier last week, there's -- that created  
4 this wrinkle where the Debtors actually start to move money.

5 They start to fund \$20 million into the litigation  
6 to be earmarked, to be segregated into the litigation trust  
7 or into litigation activities. Your Honor, we don't believe  
8 the segregation is appropriate or necessary, but if those  
9 words are going to be used, we think it ought to be clear  
10 that they are without prejudice to the rights of any of the  
11 creditors to pursue those funds as assets of the estate.

12 THE COURT: Okay.

13 MR. KRELLER: The --

14 THE COURT: I thought the proposed order actually  
15 made it clear that this was estate -- this continued to be  
16 estate property, it was not property held in trust or  
17 anything like that.

18 MR. KRELLER: Well, it doesn't go quite that far.  
19 It does say it's estate property.

20 THE COURT: Right.

21 MR. KRELLER: But the very notion that it's  
22 somehow being segregated or that segregation is appropriate  
23 leads to the implication that somehow rights are being  
24 affected. And, Your Honor, in our view --

25 THE COURT: It's \$15 million, right? It's not --



1 MR. KRELLER: It's -- I believe it's \$20 million.  
2 It's 15 and then 5 coming out of one of the -- out of the  
3 winddown account.

4 THE COURT: Right. Okay.

5 MR. KRELLER: And then that's subject to top up  
6 from first assets in to get it up to 25.

7 THE COURT: Right. Okay.

8 MR. KRELLER: So certainly, the implication is  
9 that those funds are being set aside, segregated, ear  
10 marked, which sounds to me -- and I don't see anything in  
11 the documents that gives me great comfort otherwise -- that  
12 they're being removed one step further away from creditors  
13 and potential creditor distributions than other assets or  
14 cash the estates may have.

15 And, Your Honor, I would submit that during the  
16 post-confirmation, pre-effective date period, there's no  
17 reason for that money to move and there's no reason for  
18 creditors' rights to be impaired or potentially impaired by  
19 virtue of the segregation of those funds. The professionals  
20 will remain. They'll be doing the work they do. The estate  
21 professionals will be subject to ordinary course fee  
22 procedures in these cases and they'll have access to the  
23 carveout and the other accounts that they have for their  
24 benefit.

25 There's no reason to move this money. They'll do

1 the work. They'll do whatever they're doing in the  
2 litigation at the direction of the litigation designees, but  
3 somehow setting this money aside to the potential prejudice  
4 of creditors is a problem and it's premature. That money  
5 was always going to be funded under the plan on the  
6 effective date, but somehow this provision pulling it  
7 forward to the confirmation order found its way into the  
8 administrative claims settlement, an issue that appears to  
9 be completely unrelated but nonetheless is significant.

10 We've proposed language and there's some language  
11 going back and forth to try to make clear and amplify and  
12 extend upon the Debtors' draft language about the funds  
13 being estate funds, but we don't have agreement there yet,  
14 Your Honor, and that language ought to be protective of  
15 creditors and it ought to make clear that those funds,  
16 whether they're in the estate as estate funds or whether the  
17 plan goes effective and those funds go into the litigation  
18 trust, that they are litigation trust assets that are  
19 subject to the claims and rights of creditors to creditor  
20 distributions.

21 That money ought to be available to creditors, if  
22 it hasn't been expended.

23 THE COURT: So what is the language you're  
24 proposing?

25 MR. KRELLER: Your Honor, I can -- well, we don't

1 have agreement on the language and there's, I guess, a  
2 couple of different sets of language going back and forth.  
3 I had proposed language last -- earlier this morning to the  
4 Debtors which they rejected and ESL's counsel had proposed  
5 language to that effect that's been circulating during the  
6 hearing and that's been rejected as well.

7 Your Honor, I'll look for -- if you give me a  
8 moment, I'll look for my... The language, Your Honor, and  
9 this is language that ESL and Cyrus would live with, and  
10 that language is, "for the avoidance of doubt and  
11 notwithstanding anything to the contrary contained in the  
12 plan or the liquidating trust agreement, in the event that  
13 any disputed claim ultimately becomes an allowed claim," --  
14 and it's defined as a subsequently allowed claim --  
15 "including by reason of any appeals of any orders of this  
16 Court disallowing such claim, nothing in the confirmation  
17 order, plan, or the liquidating trust agreement limits the  
18 ability of the holder of any such subsequently allowed claim  
19 to assert a claim including a priority claim or to obtain a  
20 recovery from any liquidating trust assets to satisfy such  
21 subsequently allowed claim including, without limitation,  
22 the funds in the litigation funding --

23 THE COURT: That's quite different than what you  
24 were just talking to me about. That's basically saying that  
25 even after -- the liquidating trust doesn't go into

1 existence until the plan actually goes effective.

2 MR. KRELLER: Correct.

3 THE COURT: So that doesn't work. I can see why  
4 they rejected that.

5 MR. KRELLER: Well, Your Honor, it's at both  
6 points in time, though.

7 THE COURT: No.

8 MR. KRELLER: The liquidating trust assets are  
9 defined as the assets that in the liquidating trust and  
10 available for distributions to creditors.

11 THE COURT: I think you're going to have to divide  
12 up the two. I mean, there's a fundamental issue that was  
13 raised in your objection, was that you wanted a reserve for  
14 the claim that I had already ruled on. To me, that seemed  
15 to be contrary to the caselaw and flipping the whole notion  
16 of who should be posting a bond for a stay pending appeal.

17 But I thought you were going on a very different  
18 tack here, which is that pending the effective date, the  
19 money is property of the estate and is not being held in  
20 trust or otherwise. I mean --

21 MR. KRELLER: And that's --

22 THE COURT: I have no problem with that. It's not  
23 being held in trust, right?

24 MR. SCHROCK: Your Honor, we have language in the  
25 confirmation order that says that. It's Paragraph 57.

1 THE COURT: Well, does it say it's not being held  
2 in trust?

3 MR. SCHROCK: Yeah, Your Honor, I'll just read it.  
4 It says, "For the avoidance of doubt, the funds in the  
5 litigation funding account and the cash reserve account  
6 shall remain property of the estates and after the effective  
7 date, liquidating trust assets provided that use of such  
8 funds shall be subject to plan and/or liquidating trust  
9 agreement and the funds in the cash reserve account shall be  
10 subject to the administrative expense claims consent  
11 program."

12 THE COURT: Okay. So, look, if -- dealing with  
13 the post-effective date aspect of this, I think you all  
14 should just stay away from. I mean, that all -- it's all  
15 wrapped up in issues of mootness and appeal and all those  
16 sorts of things. Seeking a stay, which hasn't been sought  
17 because there's nothing to seek a stay of because the plan  
18 hasn't been confirmed. I think you should just focus on the  
19 pre-effective date period.

20 And I mean, as long as it's clear that this money  
21 is property of the estate and not being held in trust...

22 MR. KRELLER: Your Honor, it ought not be held in  
23 trust in the post-effective date period. I --

24 THE COURT: Well, if the plan provides for that  
25 level of funding, it's not held in trust but that's what the

1 plan would provide for.

2 MR. KRELLER: The cash will, to the extent it's  
3 not been consumed, that cash will be a liquidating trust  
4 asset that ought --

5 THE COURT: Right.

6 MR. KRELLER: -- to be available to creditors.

7 THE COURT: If the plan says to the contrary, and  
8 literally no one has objected on that basis, I don't see why  
9 -- except for ESL, the target of the litigation. You know -  
10 -

11 MR. KRELLER: The --

12 THE COURT: -- I guess the answer is, tough. The  
13 plan controls. I --

14 MR. KRELLER: Well, Your Honor, this issue came  
15 about because of how this provision found its way into the  
16 administrative expense settlement. And so the notion that  
17 no one objected to it, the money was always going to be an  
18 effective date issue; otherwise, everything was staying in  
19 the estate. And all we're looking for in terms of the post-  
20 effective date period is clarification that there's no  
21 intention that the liquidating trust assets including those  
22 funds would somehow be withheld from creditors with allowed  
23 claims.

24 THE COURT: Well --

25 MR. KRELLER: If it gets used up, it gets used up

1 and it's not there. But if it is there and creditors  
2 including administrative creditors, have claims assertible  
3 against that money, they should have that right to be able  
4 to pursue those funds and not --

5 THE COURT: Well --

6 MR. KRELLER: -- have the professionals play keep-  
7 away with them.

8 THE COURT: But it's -- the money is being --  
9 well, when you say used up, what do you mean? I mean,  
10 obviously --

11 MR. KRELLER: Spent on --

12 THE COURT: It will be --

13 MR. KRELLER: Spend on professionals.

14 THE COURT: If it's not spent on professionals,  
15 then yes, it goes over to the general uses, but I guess I...

16 MR. KRELLER: Your Honor, I'm actually surprised  
17 this is controversial with the Debtors and the UCC.

18 THE COURT: It's controversial for the post-  
19 effective date period and I understand their position  
20 entirely on that point. As far as the pre-effective date  
21 period is concerned, saying that it's property of the estate  
22 and not being held in trust is enough. You don't need to  
23 specify who has a right to it under what circumstances.  
24 Everyone would have a right to it, pre-bankruptcy, if  
25 there's circumstances that would give you a right to it.

1 MR. KRELLER: I --

2 THE COURT: I mean, pre-effective date.

3 MR. KRELLER: That's my position, Your Honor,  
4 which is why I don't understand the --

5 THE COURT: Well, the language you read me also  
6 covered the post-effective date.

7 MR. KRELLER: It does, but --

8 THE COURT: Well, but it shouldn't.

9 MR. KRELLER: What is the purpose of the  
10 segregation if, in fact, they remain estate assets --

11 THE COURT: Because you want to keep track of it.

12 MR. KRELLER: -- subject to creditor claims?

13 THE COURT: You want to know where it is. You  
14 know what? It's psychological, frankly. That's what it is.  
15 And I think who is objecting -- I think the people who are  
16 objecting to this are experiencing the psychological effect  
17 which, I think, was intended. That's why litigation budgets  
18 are largely created, just for that reason.

19 MR. KRELLER: Your Honor --

20 THE COURT: So I don't --

21 MR. KRELLER: Your Honor, as the second largest  
22 unsecured creditors in the case and potentially with a 507,  
23 we stand to benefit probably more than most from successful  
24 -- from the successes of the litigation trust.

25 THE COURT: Well, you're also --



1 MR. KRELLER: So --

2 THE COURT: -- an investor in Transform and could  
3 be -- that investment could be hurt by adverse litigation  
4 against Transform's controlling party, so look. It's fine  
5 that you're a large creditor. I get that. But I don't see  
6 anyone else complaining about this language. It just  
7 doesn't -- it's property of the estate. It's there, yes.  
8 Everyone knows that it's intended to be used post-effective  
9 date to litigate with.

10 And if the rulings against your clients are  
11 reversed or if I confirm the plan, the plan confirmation  
12 order is reversed, we'll be in a different environment. But  
13 that presumes all sort of things that I can't deal with at  
14 this point, including your burden to get a stay of various  
15 orders and maybe have to post a bond and all those sorts of  
16 things. I think you're basically trying to get the bond  
17 flipped on its head here by having the debtor, in essence,  
18 post the bond.

19 At least that's what the objection was all about  
20 and I'm setting up a reserve. It just doesn't --

21 MR. KRELLER: Well --

22 THE COURT: Doesn't compute.

23 MR. KRELLER: Your Honor, I'll -- on this point,  
24 the reason that nobody else has objected to this is because  
25 this showed up at midnight in a Tuesday night filing last

1 week that --

2 THE COURT: Well --

3 MR. KRELLER: That was the first point in time in  
4 which any money was going to move --

5 THE COURT: But it's not moving.

6 MR. KRELLER: -- pre-effective date

7 THE COURT: It's not moving. It's clear that it's  
8 property of the estate, not being held in trust. It's under  
9 this rubric because everyone knows that's what this is  
10 intended to do ultimately when the plan goes effective and  
11 it was part of the negotiation of the administrative claims  
12 settlement procedures for the party to know where the money  
13 was going to be ultimately. But it's not -- it's  
14 psychological. It has no legal consequences.

15 MR. KRELLER: Your Honor, with that statement from  
16 you that it -- that the segregation has no legal  
17 consequences --

18 THE COURT: Pre-effective.

19 MR. KRELLER: -- I'll stop talking about --

20 THE COURT: Okay. Pre-effective.

21 MR. KRELLER: -- that issue.

22 THE COURT: Okay.

23 MR. KRELLER: On the reserve issue, the plan  
24 provides that disputed claims reserves shall be provided on  
25 the effective date for disputed claims. The 507(b) claims

1 are disputed claims because they are not the subject of a  
2 final order. The plain reading, the words of the plan, are  
3 what would entitle us to a reserve.

4 THE COURT: There's not --

5 MR. KRELLER: And now, Your Honor, I don't think  
6 that's --

7 THE COURT: There's no stay of my order.

8 MR. KRELLER: There is no stay of your order, but  
9 it is not a final order.

10 THE COURT: I --

11 MR. KRELLER: But, Your Honor, that's not for  
12 today, either. That only becomes relevant if there is an  
13 effective date coming where there's actually money to deal  
14 with and the appeal might be in a different -- those --

15 THE COURT: It may well be --

16 MR. KRELLER: -- claims might be in a different  
17 status --

18 THE COURT: But I'm certainly not --

19 MR. KRELLER: -- at that point in time.

20 THE COURT: I'm not setting a reserve at this  
21 point.

22 MR. KRELLER: I'm not asking you to, Your Honor.

23 THE COURT: Okay.

24 MR. KRELLER: I interpret the plan as it's  
25 written.

1 THE COURT: Okay. I'm not sure whether a reserve  
2 is required at any point, but I think at this point, it's  
3 not appropriate to order one and it does seem to me that  
4 Judge Farnan is right on here in In RE: Oakwood Homes  
5 Corp., 329 B.R. 19.

6 MR. KRELLER: Your Honor, I think the facts of  
7 that case were a bit different. I think that that claim,  
8 the request for a disputed claims reserve was actually  
9 denied in those cases. I think there was a different  
10 procedural posture. It wasn't just simply a disputed claim  
11 for plan purposes. But again, Your Honor, that's not --  
12 that's actually not a confirmation issue for today. It's an  
13 effective date issue for the flow of funds, what the flow of  
14 funds looks like in the event that there are funds to flow.

15 THE COURT: Okay.

16 MR. KRELLER: Your Honor, a couple of other  
17 points. I had simply -- I had requested of the Debtors a  
18 fairly simple sentence or two basically stating that in the  
19 confirmation order that pending the plan effective date,  
20 Debtors remain as Debtors in Possession with all of their  
21 rights and obligations and subject to the requirements of  
22 the Bankruptcy Code and the Bankruptcy Rules and other  
23 applicable law, while in the estates and while as Debtors in  
24 Possession.

25 That language was rejected out of hand. I don't

1 quite understand that. It appears to be that that is, I  
2 think the reality and that's what I hear you saying as well.

3 THE COURT: Right.

4 MR. KRELLER: And, Your Honor, I --

5 THE COURT: I mean, that's the law.

6 MR. KRELLER: It is, Your Honor, but in a case  
7 where these Debtors may be operating as Debtors in  
8 Possession for a long time before a plan ever goes  
9 effective, it would seem to me that a simple statement in  
10 the confirmation order --

11 THE COURT: We don't need that. I mean, then  
12 (indiscernible) start incorporating specific provisions of  
13 the bankruptcy code and it's just --

14 MR. KRELLER: The language --

15 THE COURT: The law is clear on this point.

16 MR. KRELLER: That's fine, Your Honor. We had  
17 also asked, there's a provision and it's been beefed up in  
18 the order for advance notice of the anticipated occurrence  
19 of the effective date.

20 THE COURT: Right.

21 MR. KRELLER: Twenty days' notice with a 10-day  
22 period to -- for parties to object if they have issues with  
23 that.

24 THE COURT: Right.

25 MR. KRELLER: We had proposed that a similar

1 notice provision go in with respect to post-effective date -

2 -

3 THE COURT: That's --

4 MR. KRELLER: -- future distributions.

5 THE COURT: And I asked Mr. Singh that. I think  
6 that's in there now, you said?

7 MR. SCHROCK: We put in the 20 days, Your Honor.

8 THE COURT: For each distribution?

9 MR. SCHROCK: Yes, Your Honor.

10 THE COURT: Okay.

11 MR. SCHROCK: Well, we didn't put in, you know,  
12 the rights to object and the like.

13 THE COURT: Just the notice?

14 MR. SCHROCK: Just the notice.

15 THE COURT: In 20 days.

16 MR. SCHROCK: Correct.

17 MR. SINGH: Your Honor, there's actually a 30-day  
18 provision already in the plan and the trust agreement.

19 THE COURT: Okay. I don't think there should be -  
20 -

21 MR. SINGH: For future --

22 THE COURT: -- any implications that you can't  
23 come in and say, they're making payments that they shouldn't  
24 be making or whatever.

25 MR. KRELLER: I'll accept that, Your Honor. I

1 have not --

2 THE COURT: I mean, there's only one reason to  
3 give notice, which is someone complains.

4 MR. DUBLIN: It's in the definition of  
5 distribution. It says 30 days' advance notice.

6 MR. KRELLER: Okay.

7 MR. DUBLIN: You get an extra 10.

8 MR. KRELLER: Your Honor, the confirmation order  
9 in various places contains provision approving things like  
10 the plan supplement documents and finding those and  
11 approving those documents. I had suggested language that  
12 simply said those -- only those documents that are in  
13 existence and on file as of the date of the confirmation  
14 order are you approving. And again --

15 THE COURT: I can't approve something I haven't  
16 seen.

17 MR. KRELLER: Well, Your Honor, that -- that  
18 seemed to be the case to me as well, but I do think, again,  
19 given the potentially prolonged lag, I think that would be a  
20 clarification that would be worth having.

21 THE COURT: Well, I mean, there -- this wasn't a  
22 provision I focused on, but I'm assuming the plan supplement  
23 and related documents are defined in a way so it's not  
24 including documents that would be submitted in the future  
25 unless they're amendments that don't have any material

1 adverse effect on anybody.

2 MR. KRELLER: I don't know whether they are or  
3 not, Your Honor.

4 THE COURT: No --

5 MR. KRELLER: But there's -- you have a long --

6 THE COURT: That's how it should be.

7 MR. KRELLER: You have a long period of time with  
8 --

9 THE COURT: I know, but --

10 MR. KRELLER: -- with potentially --

11 THE COURT: I'm not going to approve anything I  
12 haven't seen.

13 MR. KRELLER: I understand, Your Honor.

14 THE COURT: Okay.

15 MR. KRELLER: Nor should you be asked to, but  
16 that's --

17 THE COURT: All right.

18 MR. KRELLER: -- the way the language reads --

19 MR. SINGH: Your Honor, can assure you, we're not  
20 --

21 THE COURT: Well, when I go through it, I'll -- if  
22 there's an issue there, I'll strike that out.

23 MR. KRELLER: Thank you, Your Honor.

24 THE COURT: Okay.

25 MR. KRELLER: And then, Your Honor, I would just



1 note in Paragraph 24, I believe, of the draft order, there's  
2 actually a provision that allows the Debtors to be -- and  
3 this, again, is in our limbo pre-effective date period --  
4 that would allow the Debtors to be paying litigation  
5 professionals subject to monthly invoices and it looks to be  
6 something that -- again, I think this is just inadvertence -  
7 - because we're still in the cases at that point in time,  
8 those professionals should just be getting paid under the  
9 existing fee --

10 THE COURT: Under the fee order.

11 MR. KRELLER: Under the fee order.

12 THE COURT: Right.

13 MR. KRELLER: And there's no reason that that  
14 would -- should change on confirmation --

15 THE COURT: Okay.

16 MR. KRELLER: -- of the plan.

17 THE COURT: No, that's fine. Again, it's not a  
18 limbo period. It's, as you said, the Debtor is the Debtor  
19 in Possession and this litigation committee has been created  
20 to deal with the committee -- I mean, deal with the  
21 litigation. Similarly, there's the reporting mechanism on  
22 the claims settlement, but those are things that I'm  
23 approving.

24 MR. SINGH: To the extent it was unclear, we so  
25 stipulate.

1 THE COURT: Okay. All right.

2 MR. KRELLER: That's all I have --

3 THE COURT: Okay.

4 MR. KRELLER: -- Your Honor. Thank you.

5 THE COURT: And we've confirmed that Cyrus is not  
6 a releasing party, right?

7 MR. KRELLER: Right, Your Honor.

8 THE COURT: Okay.

9 MR. KRELLER: Correct, Your Honor.

10 THE COURT: Okay. So, I mean, are there -- I  
11 don't think there are any other objections in your  
12 objection. Is there something that is raised that I should  
13 address?

14 MR. KRELLER: No, Your Honor. I believe we  
15 covered it all.

16 THE COURT: Okay. All right, thanks.

17 MR. MOLONEY: Good afternoon, Your Honor. Tom  
18 Moloney on behalf ESL.

19 THE COURT: Afternoon.

20 MR. MOLONEY: Your Honor, we filed two objections.  
21 The first one related to the plan and I think that was,  
22 essentially, worked out so the plan actually doesn't really  
23 prejudice the ability of a subsequently allowed creditor to  
24 participate fully. We filed the second objection when saw  
25 the plan supplement and I think Your Honor is right. There

1 are two points in time that are relevant.

2           There's a point in time when we're still basically  
3 in the same status that we are now which is a Debtor in  
4 Possession status and as to that point in time, I think Your  
5 Honor's statement that they've created an account but it  
6 doesn't -- just a nominal account and it has no trust  
7 significant, if Paragraph 57 of their order said that, we  
8 wouldn't be objecting. It doesn't say that. It says it  
9 shall be property of the estate subject to this liquidating  
10 trust agreement which had provisions which include not only  
11 a single --

12           THE COURT: But that's subject -- that doesn't go  
13 into effect until confirmation.

14           MR. MOLONEY: I don't know what --

15           THE COURT: I mean, I'm sorry, the effective date.

16           MR. MOLONEY: I don't know what that means for --  
17 then for it to be part of the order, though, at this point -  
18 -

19           THE COURT: Well, it's a confirmation order, so  
20 when it goes effective, the liquidation trust goes  
21 effective. Before that, it's not.

22           MR. MOLONEY: Okay, so then I'll just go to the  
23 second part of the argument, what happens then.

24           THE COURT: Okay.

25           MR. MOLONEY: But for point of clarity, then,

1 because I think that it's a mistake to walk away from this  
2 podium, I think, without having perfect clarity --

3 THE COURT: Okay.

4 MR. MOLONEY: For a point of clarity, unless and  
5 until they actually confirm a plan, whatever money they put  
6 into --

7 THE COURT: Unless and until it goes effective.

8 MR. MOLONEY: It goes effective, until -- have an  
9 effective plan, whatever they want to call this account  
10 they're setting up, it remains property of the estate and  
11 remains subject to the rights of potentially secured  
12 creditors and potentially priority creditors who have a  
13 higher priority than administrative -- (indiscernible)  
14 administrative claims. So now we go to future  
15 (indiscernible). Your Honor, admittedly, this is a place  
16 holder point.

17 It's not for -- and we did not seek a reserve and  
18 we're not asking you to stay anything. But this is a  
19 liquidating plan. Under the code, 1145, they are not  
20 entitled to a discharge so they can't get a de facto  
21 discharge of our priority claim by playing some game through  
22 a trust agreement. So once they're in this future world, if  
23 we do, in that future world, prevail and Your Honor, I  
24 understand that they don't think we'll prevail. Probably  
25 Your Honor doesn't think we'll prevail.

1 But, you know, I'm always an optimist and so I  
2 think there's a chance we'll prevail. And we come back down  
3 here and we say, well, Judge, we actually have a secured  
4 claim. We can trace our proceeds to this account. Or,  
5 Judge, we have a super priority claim and we have higher  
6 priority than whatever other use they want to use the money  
7 in this account. I don't think at that point in time they  
8 can say, well, sorry, if the liquidating trust wants to use  
9 that money, so for you to fund a lawsuit against yourself,  
10 they should be allowed to do that.

11 I don't think the plan can provide for that  
12 outcome. I don't think it legally can provide for that  
13 outcome.

14 THE COURT: Well, I guess certainly if the plan  
15 were confirmed, you would have to get two reversals, right?  
16 You'd have to reverse the claims order and confirmation.  
17 But you're saying it shouldn't be confirmed in the first  
18 place?

19 MR. MOLONEY: No, I'm not, Your Honor. All --  
20 what I'm saying is, I don't need -- I don't think I need to  
21 challenge this plan in any respect. I think the plan as  
22 drafted is fine and I don't think I -- I can pursue my  
23 appeal. I (indiscernible) claim. I can come back and live  
24 in the regime that exists post-confirmation of a liquidating  
25 pot plan. This is not a case where, Your Honor, there's a

1 new business and it needs to have a clean balance sheet --

2 THE COURT: No, but this is --

3 MR. MOLONEY: -- and it can't have contingent  
4 liabilities.

5 THE COURT: Look, I think it's -- I ruled on this  
6 issue on the U.S. Trustee's objection. I don't believe that  
7 the -- I guess you're saying the plan injunction is,  
8 effectively, a discharge?

9 MR. MOLONEY: No, I'm not arguing that.

10 THE COURT: You're not.

11 MR. MOLONEY: I'm saying it's just a supplement  
12 that they put out. It's only -- it's not the plan at all.  
13 I don't have a problem with the plan at all. The plan  
14 supplement, which they now incorporate into this order,  
15 purports to give to this litigation trust board discretion  
16 to set aside on an evergreen basis \$25 million or more into  
17 an account which no one can get a hold of but them.

18 THE COURT: But if -- so then the issue is, I  
19 think, a fairly technical one.

20 MR. MOLONEY: Right.

21 THE COURT: Which is, I think -- I'll go back to  
22 what I said earlier. I think you would need to have the  
23 reversal of two orders.

24 MR. MOLONEY: No.

25 THE COURT: You would have to have the reversal of

1 the -- well, depends on the timing. But let's say that the  
2 plan went effective before there was a determination on the  
3 appeal on the 507(b) issue.

4 MR. MOLONEY: Right.

5 THE COURT: The plan -- if the plan did go  
6 effective, then.

7 MR. MOLONEY: I don't see why we need any  
8 reversals, Your Honor. We just --

9 THE COURT: Well --

10 MR. MOLONEY: -- come right back down and assert  
11 our claim, if it's allowed.

12 THE COURT: I'm not sure of that. I think you  
13 might need a reversal of the plan, too, of the confirmation  
14 order.

15 MR. MOLONEY: Not if I'm successful right now.  
16 Not if I'm successful --

17 THE COURT: well, but you just said you don't --

18 MR. MOLONEY: -- right now in getting Your Honor -  
19 -

20 THE COURT: But you just said you don't mind if  
21 the plan is confirmed.

22 MR. MOLONEY: Correct. It's just the plan  
23 supplement provision.

24 THE COURT: But that's --

25 MR. MOLONEY: If the plan supplement provision is

1 consistent with the plan, I don't have a problem with the  
2 plan. The plan supplement provision, what it says, Your  
3 Honor, in the plan supplement, it says the litigation board  
4 has the right to create a \$25 million entitlement or such  
5 ever amount as they want, whatever they want. And that -- I  
6 want to be clear, if that happens and it's just these three  
7 guys --

8 THE COURT: But the --

9 MR. MOLONEY: -- sitting there decided that they  
10 don't want to pay a particular creditor and they'd rather  
11 have the money available to pursue a pipe dream litigation,  
12 then I don't think I should have to pay for it.

13 THE COURT: But the plan itself contemplated  
14 funding of the litigation trust.

15 MR. MOLONEY: I have no problem with that, Your  
16 Honor.

17 THE COURT: So what's the distinction?

18 MR. MOLONEY: The distinction is that the money  
19 that's available depends on what's the money that's  
20 available. They just cannot cut off the rights -- the plan  
21 doesn't create money, right? The plan doesn't create  
22 assets. The plan just says, whatever money is here is for  
23 use in these purposes. And so if there is no money to fund  
24 this trust, that's not my problem, all due respect.

25 And certainly if I have a super priority claim and



1 I say, you're going to have to pay me before you -- you can  
2 go ahead and fund the trust. You can go out and get -- find  
3 litigation funding or you can go out and find a contingency  
4 lawyer to do this because there's no way that if this was a  
5 viable claim it couldn't be funded a million ways other than  
6 stealing my money.

7 THE COURT: Is this in your supplemental  
8 objection?

9 MR. MOLONEY: Yes, Your Honor.

10 THE COURT: Where?

11 MR. MOLONEY: Exactly.

12 THE COURT: I don't --

13 MR. MOLONEY: This is exactly the part. We made  
14 this so we wanted clarity that these funds -- Paragraph 6.  
15 "ESL, of course, recognizes it will have no right to payment  
16 unless it prevails on appeal, but should ESL prevail, its  
17 ability to collect on traceable collateral proceeds or to  
18 assert a 507(b) statutory priority claim cannot lawfully be  
19 compromised by these self-help measures in the plan trust  
20 agreement." That's our position.

21 And this is not -- there's nothing in the  
22 Bankruptcy Code that authorizes you to do this. They're not  
23 held in the discharge. There's nothing in the Bankruptcy  
24 Code that says --

25 THE COURT: But this doesn't have anything to do

1 with the discharge.

2 MR. MOLONEY: Effectively, it's a billed --  
3 pertained to discharge because it's aimed at one group of  
4 creditors. It's to say, look, if they don't want to pay  
5 you, they have a right sitting there in the liquidated trust  
6 not to pay you. Even though you have a priority claim and  
7 you've won an appeal and the Bankruptcy Code says you should  
8 be paid ahead of everybody else, if they don't want to do  
9 it, they don't have to.

10 THE COURT: The only thing I'm grappling with is,  
11 again, if you just appeal the -- well, if you just have the  
12 appeal that's currently on file.

13 MR. MOLONEY: Correct.

14 THE COURT: And you don't appeal confirmation,  
15 then there's a -- or you do appeal confirmation, there's all  
16 separate standard for dealing with that type of appeal --

17 MR. MOLONEY: Yeah, but I don't see --

18 THE COURT: -- that deals with mootness and those  
19 sorts of --

20 MR. MOLONEY: Yeah. I don't see why I have to be  
21 involved in that at all. I really have no interest in it.

22 THE COURT: Because it's the plan.

23 MR. MOLONEY: But the plan doesn't -- with all due  
24 respect, Your Honor. I'm fine with the plan. This is a  
25 trust supplement agreement filed at 2:00 in the morning the

1 day before a hearing that contains other provisions that are  
2 not in the plan.

3 THE COURT: Well, we should look at -- we should  
4 at the disclosure too. What does the disclosure statement  
5 say on the funding of the plan?

6 MR. SINGH: Your Honor, I believe it -- you know,  
7 we'll get the specific page reference. But I know it  
8 references the liquid- -- you know, the liquidating trust  
9 with approximately \$25 million in it for --

10 THE COURT: Yeah. I mean, the settlement that  
11 came out recently cut back on that.

12 MR. SINGH: Right.

13 THE COURT: Didn't add to it.

14 MR. SINGH: Right.

15 MR. MOLONEY: But the language in the trust  
16 agreement makes it evergreen, Your Honor. There's nothing  
17 in that disclosure statement that says they can do it on an  
18 evergreen basis.

19 MR. SINGH: This seems like an equitable move.

20 MR. MOLONEY: It's not an equitable move.

21 THE COURT: I understand if you're modifying the  
22 plan, including how it's described in the disclosure  
23 statement. You certainly can describe generally in the  
24 disclosure statement documents that are filed later, if  
25 they're consistent with that, then that's what I would be

1 confirming. So maybe it's the evergreen feature. I don't,  
2 you know -- I think they contemplated 20 million -- I think  
3 it's --

4 MR. MOLONEY: As a practical matter, \$25 million  
5 is probably going to be spent before I ever can get back  
6 down here, so I'm really more concerned with the evergreen.

7 THE COURT: Well, I doubt that. I doubt it would  
8 be all spent, although when litigators, as I say, breathe on  
9 a file, it's \$50,000. I'm looking for the disclosure  
10 statement reference to this at this point. I think it's --

11 MR. SINGH: Your Honor, first of all, I don't  
12 think it's an evergreen. I think it's a one-time funding.

13 THE COURT: Okay.

14 MR. MOLONEY: It's what it says.

15 MR. SINGH: Oh, Your Honor, it's in Page -- excuse  
16 me -- it's Page 3 of the disclosure statement where we talk  
17 about the litigation assets. So I'll read the two  
18 sentences: "Upon the transfer of the liquidating trust  
19 assets, the Debtors shall have no interest in or with  
20 respect to the liquidating trust assets or liquidating  
21 trust. The Debtors estimate that the liquidating trust will  
22 be funded with approximately \$25 million on the effective  
23 date," which relates to this issue of segregation, which we  
24 disclosed.

25 MR. MOLONEY: Okay. That makes my point for me,

1 Your Honor. But before I get there, if I --

2 THE COURT: But why? That's the plan that -- I  
3 mean, why is that -- look, again --

4 MR. MOLONEY: It doesn't say a word about it being  
5 segregated from other creditors. It doesn't say --

6 THE COURT: No, but it'll be transferred to the  
7 trust, so that's --

8 MR. MOLONEY: The trust is for the benefit of the  
9 creditors, right, not for the benefit -- I thought it was  
10 for the benefit of the creditors, not for the benefit of the  
11 three trustees and professionals.

12 THE COURT: No, but it says it's funded with the -  
13 - can you read the sentence again, Mr. Singh?

14 MR. SINGH: Yes. Again, Page 3: "Debtors estimate  
15 that the liquidating trust will be funded with approximately  
16 \$25 million on the effective date."

17 THE COURT: Okay. All right.

18 MR. MOLONEY: If they have the money and there's  
19 no prior claim to it, they can fund it; I have no problem  
20 with that.

21 THE COURT: Okay.

22 MR. MOLONEY: But if they don't -- but if we have  
23 a prior claim, we should be able to object to that, and we  
24 shouldn't have to object to the plan.

25 THE COURT: No. I think you should -- I think you

1 do have to seek a stay if you're saying that this funding  
2 shouldn't happen. I think the \$25 million is clearly for  
3 litigation purposes, right? It's not for distribution  
4 purposes.

5 MR. SINGH: Absolutely, Your Honor. And if you  
6 read the definitions throughout the plan, they make clear  
7 that what we are distributing is net proceeds, which allows  
8 the directors the discretion every time they go to make a  
9 distribution to decide how much they want to hold back for  
10 going forward purposes.

11 THE COURT: Right.

12 MR. SINGH: I feel like we're being penalized that  
13 we actually went out and said well, it'll be \$25 million,  
14 what everybody's been told.

15 THE COURT: I agree with you, Mr. Moloney, that if  
16 the effective date occurs and subsequently, the 507 is  
17 reversed and you have -- you can trace your claim to the  
18 funds, et cetera, that you should be able to go after them.  
19 But I think you will need, in addition to getting that order  
20 reversed, you would have to get either a stay or you'd have  
21 to get the confirmation order reversed. Because I think  
22 that clear context of this plan is that the funding, subject  
23 to, you know, the appeal issues, is for litigation purposes.

24 MR. MOLONEY: Your Honor, can I just raise an  
25 issue then? The document that they actually filed, which

1 says that --

2 THE COURT: This is the supplement.

3 MR. MOLONEY: The supplement, in Paragraph B --  
4 I'm reading from Paragraph B on Page 4, it's 1.3(b). It's  
5 what we quoted in our objection. It says that, "In addition  
6 to that there should be set outside \$25 million, is it  
7 provided, however, that the funding may be increased from  
8 time to time during the term of litigation trust, from the  
9 proceeds of the liquidating trust assets, or from such other  
10 sources as may be determined in the sole discretion of the  
11 liquidating trust board."

12 I read that as evergreen language. That, where it  
13 says that, "funding may be increased from time to time  
14 during the term of the litigation trust, from the proceeds  
15 of the liquidating trust assets, or from such other sources  
16 as may be determined in the sole discretion of the  
17 litigation trust board."

18 I read that -- I don't read that as being  
19 consistent at all with the disclosure of, we may have \$25  
20 million. This says that we're going to have a reprise of  
21 what happened under the DIP order where they're going to say  
22 there's a special account set aside and they're going to put  
23 all money in there. And it's going to just frustrate our  
24 rights to get paid if we win our appeal, and that will not  
25 be right.

1 THE COURT: But, again, you can -- right now,  
2 there's no allowed claim, all right? So if you win on  
3 appeal, it depends on whether the plan has been confirmed  
4 and gone effective as to whether and how you could get that  
5 money back. It's not just based on winning on the appeal  
6 necessarily, because if the plan is confirmed and goes  
7 effective, it's binding, it's terms are binding.

8 MR. MOLONEY: Correct. But today is the day when  
9 I have a chance to tell Your Honor that I shouldn't have to  
10 -- and I have to tell Your Honor because I can't appeal your  
11 ruling, with all due respect, unless I make the case today  
12 and you disagree, which you're quite entitled to do. But I  
13 have to make the case that perhaps that this particular  
14 provision is overreaching and I shouldn't have to include  
15 this in my appellate brief; the fact that they've created a  
16 liquidating trust fund, which they built a wall -- build a  
17 wall around.

18 THE COURT: But your only basis for going after  
19 that provision on a legitimate basis is that the money is  
20 more properly distributed on account of a claims that I said  
21 it can't be distributed on.

22 MR. MOLONEY: Well, at the moment -- actually I  
23 think at the moment --

24 THE COURT: Right. And so --

25 MR. MOLONEY: At the moment, our administrative



1 claimants who also could be prejudiced by these provisions.

2 THE COURT: But they don't -- they haven't  
3 objected. In fact, they negotiated a reduction of the  
4 initial funding instead because they want the lawsuit to go  
5 ahead against your clients.

6 MR. MOLONEY: I don't know that that -- I don't  
7 know -- I don't know --

8 THE COURT: And everyone else did too. Every  
9 single administrative objector who objected said, we don't  
10 want to cut back on the litigation against ESL. So I think  
11 --

12 MR. MOLONEY: I think -- you know, Your Honor, I  
13 think you got to take that with a grain of salt, right?

14 THE COURT: Well, no. I mean, if I'm going to  
15 take any grains of salt, it's ESL saying there shouldn't be  
16 so much money to sue me with.

17 MR. MOLONEY: Well, they're not going to get --  
18 they're not --

19 THE COURT: So, I mean, the only issue is --

20 MR. MOLONEY: They're not getting more money from  
21 their lawsuit, Your Honor, so why would they care?

22 THE COURT: All right.

23 MR. MOLONEY: I mean, as you said, they've  
24 objected on the administrative claim and they're getting  
25 paid a discount on administrative claim and so, they're

1 done. So what'll -- they don't have a -- they didn't throw  
2 in a kicker.

3 THE COURT: No, no, that's not true. There are  
4 plenty of people who are not going to do the settlement and  
5 they're going to wait and get their hundred cents.

6 MR. MOLONEY: Those people have not -- I've not  
7 heard from in court saying --

8 THE COURT: Well, because they're not unhappy with  
9 the result. But, again, it's an easy thing on your brief,  
10 which says that to get my remedy, we have to reverse this  
11 provision of the plan and go after it. It's pretty easy.  
12 And I don't, frankly, even see mootness because it's there,  
13 it's sitting there.

14 MR. MOLONEY: Thank you, Your Honor.

15 THE COURT: So, you know, so if you asked for a  
16 stay, you'd have -- you probably wouldn't get one because it  
17 wouldn't be moot. You wouldn't have to post a bond; you  
18 just go forward.

19 MR. MOLONEY: Exactly, Your Honor. Thank you.

20 THE COURT: Okay, all right.

21 MR. ANKER: Your Honor, Philip Anker, Wilmer  
22 Cutler Pickering Hale and Door. We represent ESL in the  
23 litigation that will occur. And I apologize first for tag-  
24 teaming you.

25 THE COURT: All right.

1 MR. ANKER: And I want to say in interest of full  
2 disclosure that I want to give an explanation.

3 THE COURT: Well, I'm sorry, this is the --

4 MR. ANKER: Fraudulent transfer.

5 THE COURT: So ESL as defendant.

6 MR. ANKER: Correct.

7 THE COURT: As opposed to --

8 MR. ANKER: We represent ESL, Mr. Lampert and  
9 related entities.

10 THE COURT: As opposed to Appellant.

11 MR. ANKER: Pardon me, Your Honor?

12 THE COURT: As opposed to Appellant.

13 MR. ANKER: Correct, Your Honor.

14 THE COURT: Okay.

15 MR. ANKER: We're also on the appeal brief. But,  
16 yes, Your Honor. I'm here in a different capacity.

17 THE COURT: Okay.

18 MR. ANKER: And I want to raise an issue, to be  
19 candid, it's not in any objection, but it arises out of the  
20 revised administrative claim notice filed this morning.

21 THE COURT: Right.

22 MR. ANKER: I didn't see it until I got here at  
23 noon.

24 THE COURT: Okay.

25 MR. ANKER: And Your Honor obviously was concerned

1 about disclosure, and my only -- I am rising solely on  
2 disclosure.

3 THE COURT: Okay.

4 MR. ANKER: In the quote/unquote, "risk factors",  
5 the Debtors now say -- and I can point you to the page, but  
6 I think you read it today, so I don't think I have to --  
7 that, quote, "The Debtors believe they will receive  
8 significant recoveries" end quote, from the proceeds of  
9 various litigation, including that against my client.

10 THE COURT: All right.

11 MR. ANKER: And that they believe, having done an  
12 investigation, that the claims are, quote, "highly  
13 meritorious" end quote. And this is obviously a document  
14 going out under the imprimatur of a court notice.

15 THE COURT: No, I read that. And I think it  
16 should say that the prospective -- the current and  
17 prospective defendants in that litigation disagree with this  
18 assessment and the ultimate result is unknowable at this  
19 time.

20 MR. ANKER: Your Honor, that's fine. I was going  
21 to say, I was surprised by all of this because in the  
22 disclosure statement, there was nothing of the kind. There  
23 was simply a statement that they did an investigation and  
24 then they filed suit, and then there was a paragraph setting  
25 forth our position.

1 THE COURT: Okay.

2 MR. ANKER: And our position, including that many  
3 of the claims here are time barred, there are releases.

4 THE COURT: Right. No, that's fine.

5 MR. ANKER: Your Honor noted today that many of  
6 the creditors, when they were dealing with this Debtor, must  
7 have thought the Debtor was solvent because they separate --  
8 dealt with separate Debtors. We also noted there that if  
9 you look at the market evidence, including where the market  
10 price of the stock was, it was in the billions upon billions  
11 of dollars. But that's not for today.

12 I was going to suggest the following language, but  
13 I'm happy to have your language, and I'm happy to take out  
14 adjectives if they take out adjectives. I was going to say  
15 ESL thinks the claims are entirely meritless, and we think  
16 the Debtors will receive recoveries of nothing because that  
17 is what we think.

18 THE COURT: All right.

19 MR. ANKER: But either way, I'm happy to have it.  
20 The only other point I would add, Your Honor, and I leave  
21 this to you -- I have two other points. One is this is  
22 coming under the imprimatur of a court notice, and I think  
23 they were emboldened, frankly, by some of what occurred last  
24 Thursday.

25 I think it would be appropriate to add a sentence

1 that simply says, the Court has obviously not heard any  
2 legal argument or heard any evidence and it's not endorsing  
3 anyone's view with respect to the litigation.

4 THE COURT: This is -- I think it just can say  
5 there can be no assurance of any recovery.

6 MR. ANKER: Okay. Your Honor, the last comment I  
7 make, and this, I really rise only as an Officer of the  
8 Court. It's not -- frankly, if this were true, it might be  
9 good for us. There's a paragraph on D&O insurance that  
10 says, and the key language here is in bold and italics:  
11 "There is at least 150 million of available directors and  
12 liability insurance that provides a source of recovery to  
13 the Debtor plaintiffs in the subcommittee adversary  
14 complaint against various parties."

15 With that were the case, and maybe it will be.  
16 Let me tell you the facts as I interpret them, and you can  
17 decide what disclosure you think is appropriate. It is true  
18 that the annual policy limit -- so for the 2015 year,  
19 separately for 2016, separately for 2017 -- is 150 million.  
20 But first, defense costs go against it. And there is, right  
21 now, litigation pending, both in state court in Illinois and  
22 state court in New York, involving disputes between insurers  
23 that D&Os are now being caught in. One litigation, D&Os  
24 have commenced, one has been commenced by the insurers, in  
25 which they point to different years. One, the primary

1 insurance, Excel with respect to 2015 says, we are  
2 exhausted.

3 Because one of the things you will hear when you  
4 get into this litigation is there was a settlement of  
5 litigation relating to Seritage with full releases granted,  
6 you'll have to assess the effect of those releases. But it  
7 says it is already between that and the Sears Canada  
8 litigation fully paid \$15 million, so that policy is drawing  
9 down to 135 million, and it says that is the only policy  
10 that could conceivably bill a year that could conceivably  
11 respond.

12 So if that's right, we're down to 135 million  
13 right now, and defense costs are going every day against it.  
14 And at the end of the day when the Debtor has a war chest of  
15 25 million for itself alone and there's not just ESL, but  
16 lots and lots of different defendants here, they will go  
17 through that D&O insurance, at least a good amount of it, I  
18 suspect.

19 Another insurer says, oh no, no, it isn't the 2015  
20 policy -- because they're the second in line, this is QBE --  
21 it is the 2018 current policy, '17 policy -- '18 policy,  
22 excuse me, that applies; that's the one that's triggered.  
23 Not surprisingly, QBE is not in that, but Excel is; it would  
24 have the first 15.

25 So here's the real truth. There may be 150

1 million in insurance, minus defense costs; there may be 135  
2 million, minus defense costs. Maybe we can say that some  
3 claims are covered by 2018, some are covered by 2015. But  
4 one thing is for sure: the insurers are fighting right now  
5 paying anything.

6 THE COURT: Well, that's the case --

7 MR. ANKER: And so, this disclosure --

8 THE COURT: -- with any insurance policy, frankly.

9 MR. ANKER: Your Honor, that's right, that's  
10 exactly right. But this is a disclosure to foreign --

11 THE COURT: No, that's fair. No, I agree with  
12 that.

13 MR. ANKER: This is completely --

14 THE COURT: So I think you should tone down that  
15 description and refer to insurers disclaiming certain  
16 coverage.

17 MR. ANKER: And I would be happy to work with Mr.  
18 Singh or others for a disclosure that is accurate.

19 THE COURT: Okay.

20 MR. ANKER: But this is simply overstated. And I  
21 rose just for those two reasons for disclosure.

22 THE COURT: Well, I don't know. I mean, having  
23 dealt with insurers for too long, it's always good to remind  
24 them of the risks of improperly disclaiming coverage too.

25 MR. ANKER: Understood, Your Honor. Thank you.



1 THE COURT: Okay.

2 MR. DUBLIN: Your Honor, Phil Dublin for the  
3 record for the Committee. We've done analysis on the  
4 Committee's side. We actually believe there may be more  
5 than \$150 million in insurance.

6 THE COURT: That's fine.

7 MR. DUBLIN: I just wanted to clarify Mr. Anker's  
8 comments.

9 THE COURT: I think dollars to doughnuts, some  
10 insurer is going to take a different position.

11 MR. DUBLIN: Oh, I'm sure about that.

12 MR. ANKER: We too think there may be more  
13 insurance.

14 THE COURT: Right, okay.

15 MR. ANKER: The (indiscernible) of statement there  
16 is.

17 THE COURT: No, that's fair. You don't want to  
18 just fix the amount. I think you need to say that certain  
19 insurers have disclaimed some portion of the coverage. And  
20 I wouldn't say in excess; I would just say approximately.

21 MR. ANKER: And we understand that a sentence will  
22 be added, Your Honor, in light of your prior remarks that  
23 ESL --

24 THE COURT: Right, strongly disputes all of the  
25 claims and there's no assurance of any recovery.

1 MR. SINGH: That's fair.

2 MR. ANKER: We'll go with your language.

3 MR. SINGH: That's fine.

4 THE COURT: Okay. All right.

5 MR. FOX: Your Honor, if I may?

6 THE COURT: Yes.

7 MR. FOX: Just two points with respect to the  
8 order. Edward Fox, Wilmington Trust. First, the paragraph  
9 8 in the proposed order, it's not clear whether the Debtors  
10 are saying that the compromises in settlements are effective  
11 immediately, meaning now, or immediately upon the effective  
12 date. In other language, in other paragraphs, it means on  
13 the effective date. I don't know what the intention was  
14 here.

15 The second point, because we're getting a little  
16 bit pregnant, so it's helpful to know what and when.

17 MR. SINGH: Your Honor, I apologize. We can  
18 clarify this. It's supposed to be on the effective date,  
19 with the exception, I would say, obviously of the  
20 administrative expense consent program, which is happening  
21 now.

22 THE COURT: Well, it says they're approved, and  
23 then it says will be effective immediately on all parties-  
24 in-interest on the effective date.

25 MR. FOX: It's a little ambiguous. It was

1       ambiguous to me as to whether effective immediately, stop  
2       there, or it was then modified by on the effective date.

3               THE COURT: I think effecting and binding are the  
4       same thing.

5               MR. SINGH: Right.

6               MR. FOX: Well, binding -- okay.

7               MR. SINGH: It's an important -- we'll add --

8               THE COURT: Well, you can put on the effective  
9       date in front, and on the effective date will be effective  
10      and binding immediately.

11              MR. FOX: That'd be fine.

12              MR. SINGH: Right. And with the exception, of  
13      course, of the administrative program.

14              THE COURT: Right, of the administrative claims.

15              MR. SINGH: Right.

16              MR. FOX: And then the other point, Your Honor, I  
17      just wanted to clarify in your ruling with respect to the  
18      indentured trustees fees. In that, the argument was  
19      different than the way you phrased it in your decision,  
20      which related specifically -- and seemingly only -- to  
21      Wilmington Trust. So I just want to make sure it was not  
22      your intention to treat us differently than the other  
23      indentured trustees are proposed -- were proposed to be  
24      treated.

25              THE COURT: Well, they didn't object.

1 MR. FOX: No, no, no. Then they'd be treated  
2 better than us; that that was the problem, they were being  
3 treated differently, meaning better.

4 THE COURT: All right. I understand that point.  
5 That provision should be modified to just provide for the  
6 charging lien and the reasonable fees and expenses for  
7 routine ordinary course matters, not any litigation either  
8 pro or against the plan.

9 MR. FOX: Thank you, Your Honor.

10 THE COURT: I mean, the other folks, I'm assuming,  
11 didn't incur those costs because they're not here.

12 MR. FOX: I'm sure that they incurred costs. I  
13 mean, several --

14 THE COURT: But not the litigation costs.

15 MR. FOX: Two of them were on the Committee, so  
16 I'm sure --

17 THE COURT: No, but that's -- but that's -- look,  
18 if you're on the Committee, that's routine bankruptcy -- I'm  
19 just -- I wanted -- your objection really went to, there  
20 shouldn't be a penalty for litigating.

21 MR. FOX: Right.

22 THE COURT: But that should cover -- there  
23 shouldn't be anything for litigating; that's the way you get  
24 rid of the penalty. There's no plus for litigating or  
25 negative for litigating. So, for example, if you guys had

1 stood up and filed a 50-page brief in favor of the plan,  
2 that shouldn't get paid for under this provision, nor should  
3 the objection get paid for. Everything else that you  
4 normally do would get paid for.

5 MR. FOX: Okay. I think we can make that work.

6 THE COURT: Okay. Because, again, you didn't want  
7 to -- the notion was, this should not be a damper on your  
8 litigation rights.

9 MR. FOX: Yes, that's correct.

10 THE COURT: Okay.

11 MR. SARACHEK: Your Honor, Joe Sarachek for me and  
12 other 15 trade creditors, trade vendors.

13 THE COURT: Right.

14 MR. SARACHEK: And particularly in light of the  
15 fact that Mr. Wander, who was shepherding along with me this  
16 trade ad hoc trade vendor committee. This -- we filed it  
17 last night and delivered to the Court, really in response to  
18 a colloquy between you and Mr. Wander about the professional  
19 fee carveout. We spent an extensive amount of time over the  
20 weekend looking at this issue.

21 And we think there's a serious issue there as to  
22 whether, after February 11th, the professional had the right  
23 to a carveout. We think that number amounts to some \$50  
24 million, and it's at Docket No. 5332. We would ask -- and  
25 the Court indicated at the hearing on Thursday that you were

1 prepared to sit down with the parties and -- I don't know if  
2 you used the word mediate, but you certainly spoke to Mr.  
3 Wander. And, again, Mr. -- there's probably 50 to 60  
4 members of this ad hoc trade vendor committee, as opposed to  
5 trade claims purchasers who have settled to date.

6 So this is a serious issue. It goes to good  
7 faith. We spent a considerable amount of time looking at  
8 it. And to the extent that the report -- well, over the  
9 week --

10 THE COURT: I mean, not by the objection deadline,  
11 although others raised the objection.

12 MR. SARACHEK: But what I'd ask, Your Honor, is we  
13 see the train is going down the tracks. But whatever the  
14 confirmation order might say, to the extent that this issue  
15 can be tabled and determined later, it's a significant  
16 issue, Judge. It's a significant amount of money. There's  
17 a real -- there's a legitimate question in the documents.  
18 In fact, there was no budget after February 11th. There was  
19 no budget after February 11th that was approved by any other  
20 party. Prior to that date, of course, there was a secured  
21 creditor.

22 And so, we would ask that this issue -- and I get  
23 it, the hour is late, but this is a significant amount of  
24 money. And just to give you a sense on 180 million of  
25 administrative claims, this would amount to 25 cents if

1 those claims were allowed in full.

2 THE COURT: Well, what you're asking is the same  
3 thing Mr. Wander was asking, which I told him last Friday  
4 was unrealistic given the parties' rights under the DIP  
5 agreement. That being said, I do believe that there should  
6 be -- and that this should be put in a notice -- some  
7 additional forbearance on immediate payment by the  
8 professionals in the case. But it's nowhere close to what  
9 you've suggested, which is everything. And that would be  
10 part of my ruling.

11 MR. SARACHEK: Okay. Thank you, Your Honor.

12 THE COURT: Okay. Frankly, I think it would go to  
13 just align the administrative creditors better. I'm sure  
14 that will not necessarily endear me to your partners, but --

15 MR. SCHROCK: Yeah. I mean, Your Honor, may I be  
16 heard on the issue?

17 THE COURT: Sure.

18 MR. SCHROCK: Okay. It's certainly, you know,  
19 this is obv- -- it's an important issue to the  
20 professionals. We -- and when we came into these cases, we,  
21 you know, on behalf of our partners and our law firms, you  
22 know, and consistent with the requirements in the Code, we  
23 said we will do so, we'll perform these services provided  
24 that we have the protection of this carveout. And that's  
25 the basis upon which, you know, we went to, you know, our

1 firms and did that; as opposed to, when you talk about  
2 fairness, an administrative expense creditor extending  
3 unsecured credit to Sears, we certainly -- we look at the  
4 order, we think it's plain on its face.

5 This is the specific circumstance in which we have  
6 negotiated for this protection. And because we went, and we  
7 had made, frankly, another concession that we didn't even  
8 think we were required to make, to try and solve an  
9 administrative expense creditor objection. I feel like, you  
10 know, now we're being thrown in with all other admin claims  
11 and the carveout for which we negotiated, Your Honor, is,  
12 you know, effectively going to be put on hold.

13 And I just want to say for the record, you know,  
14 listen, we stand by our disclosure, we stand by what we've  
15 done in the case. There's been billions of dollars of  
16 administrative claims paid in these cases. And now, for  
17 some reason, you know, the 150 that's being paid to the  
18 professionals are being singled out and parties are plucking  
19 at those. And I --

20 THE COURT: I'm focusing at -- I'm focusing on the  
21 -- a portion of the 50 that's currently being held, which I  
22 think mostly came in after the sale.

23 MR. SCHROCK: It did, Your Honor.

24 THE COURT: Right. And I think a portion of that  
25 should -- the collection, their portion of that should be



1 deferred.

2 MR. SCHROCK: Your Honor, I don't have a lot of  
3 success changing your mind on these sorts of issues. But I  
4 will say that when you're talking about --

5 THE COURT: I'll put it in this context. It's  
6 really the same context that Judge Sontchi dealt with in  
7 Molycorp. I understand there are carveouts and there are  
8 provisions in DIP orders that provide how money is to be  
9 spent on professional fees. But there's a separate  
10 requirement under the plan that the plan be feasible.

11 MR. SCHROCK: Certainly.

12 THE COURT: And while I generally believe that the  
13 projections that the Debtors have provided are reasonable  
14 under the circumstances. There's \$100 million swing even  
15 in those projections -- I'm sorry, not 100 million -- a \$65  
16 million swing even in those projections of an administrative  
17 shortfall. And if you get beyond those -- and my view is  
18 the higher end was probably another 10 or million above  
19 that. I kept saying I think that the high end was 70  
20 million more, and I think you guys are at 65, 55, that  
21 range. The emergent state is going to be considerably  
22 delayed because you're not just dealing with preference  
23 claims and liquidating the dogs and cats, which are well in  
24 the process of being liquidated.

25 MR. SCHROCK: Right. Well, you know, there is --

1       there's still an interim comp order that's in effect. There  
2       are certainly no final fee applications that are in front of  
3       the court --

4               THE COURT: No, I understand.

5               MR. SCHROCK: -- in front of the court.

6               THE COURT: I understand. And that's -- I mean,  
7       that's another point I would make.

8               MR. SCHROCK: Thank --

9               THE COURT: Which is --

10              MR. SCHROCK: You know, if --

11              THE COURT: -- if I'm going to have a holdback, I  
12       can do it now or I can do it later. I think it probably  
13       makes sense to do it now as part of a finding on  
14       feasibility. I mean, I'm just going to the chart here, if I  
15       can. The shortfall, as projected, ranges from 36.5 million  
16       to 104.5 million. So I can see, even with the claims  
17       settlement, that that goes up another, you know, \$7- to \$10  
18       million.

19              And more importantly, the low hanging fruit on the  
20       preference claims is probably in that 36 to 50 million  
21       range. And I think it would be a good thing for this  
22       company to go effective at that point, rather than having to  
23       win bigger preference claims. Now, that's the legal  
24       analysis. Because it's a feasibility analysis, there is a  
25       related appearance analysis, which may not a whole lot,

1 except for the fact that -- whereas, I think it's really a  
2 disserve to the professionals to say they've been paid --  
3 they shouldn't have been paid \$150 million because they  
4 actually really helped bring about the recovery that exists  
5 here.

6 But we're not there yet, we're not at the end game  
7 yet, and I would probably, in your next fee application,  
8 probably have a callback in light of that. My inclination  
9 is to combine both of them now and have a \$10 million  
10 holdback.

11 MR. SCHROCK: And, Your Honor --

12 THE COURT: Actually, 9 million because 1 million  
13 was added in. And I think that is approximately on the 50  
14 percent, at least puts at risk kind of the same amount that  
15 the claim program puts at risk on the 50 million. I think  
16 up until the closing date, and some period thereafter,  
17 there's absolutely no question.

18 And although there's not a lot of case law on  
19 this, I think the US Flow case, In re. US Flow Corp., 332  
20 B.R. 792 (Bankr. W.D. Mich. 2005) basically. I think that  
21 money is gone, as far as other creditors are concerned.  
22 It's not property of the estate, it's gone, there's a true  
23 carveout, et cetera. I think once the debt was paid down, I  
24 know there's the desegregated account in trust, et cetera,  
25 but you still have to go effective. And I think, for me to

1 make my feasibility finding, that's -- that's called for.

2 MR. SCHROCK: And, Your Honor, listen, you're the  
3 Judge obviously. We want the plan confirmed. And if Your  
4 Honor determines that a holdback of \$10 million is  
5 appropriate from the carveout account --

6 THE COURT: Well, a total amount, because you  
7 probably contributed 3, would be another 9.

8 MR. SCHROCK: Right.

9 THE COURT: And it's from the carveout account,  
10 which is, you know, all the professionals.

11 MR. SCHROCK: Yes.

12 THE COURT: I guess that would be done pro rata.

13 MR. SCHROCK: And, Your Honor, I think obviously  
14 that's fair. But what I don't want to have happen is,  
15 listen, my firm --

16 THE COURT: And have that keep happening? No.

17 MR. SCHROCK: We need a finding that the order is  
18 final.

19 THE COURT: That's the legal -- that's the legal  
20 context; it's to find feasibility.

21 MR. SCHROCK: Right.

22 THE COURT: And a reasonable time for the  
23 effective date to occur.

24 MR. SCHROCK: Right. But to continue that -- you  
25 know, while we're still performing services --

1 THE COURT: No, no.

2 MR. SCHROCK: -- and parties are still challenging  
3 a DIP order from --

4 THE COURT: I'm frontloading --

5 MR. SCHROCK: -- a year ago?

6 THE COURT: I'm frontloading the ruling in the  
7 context of a feasibility ruling.

8 MR. SCHROCK: Okay.

9 THE COURT: Not in the context of unfairness or  
10 Rule 60; that's not going to fly.

11 MR. SCHROCK: Okay.

12 THE COURT: But I believe that 50 percent -- I'm  
13 sorry, the 50 million that's sitting in that account today,  
14 this amount should be held back. The fee order still  
15 operates going forward, et cetera. I would not expect there  
16 to be, you know, further holdbacks.

17 MR. SCHROCK: Okay.

18 THE COURT: Because this is simply to ensure that  
19 you get to the effective date within a reasonable time.

20 MR. SCHROCK: Thank you, Your Honor.

21 THE COURT: Okay. Well, I appreciate your saying  
22 thank you. It's not an easy give.

23 MR. SCHROCK: That's all I could think of to say.  
24 No, thank you would be -- but we'll take it.

25 THE COURT: It's, you know, unfortunately, it's a

1 lot of money, but it's something that I actually see pretty  
2 often in cases, smaller cases, and it's to confirm the plan.  
3 It's not for general -- it's not a reflection on the work  
4 that was done, just as the fact that allowed administrative  
5 claims are not getting paid right now is not a reflection  
6 that they're not owed their allowed amount.

7 But I think, given the testimony and my  
8 understanding of the timing on realizing remaining assets, I  
9 think the ESL litigation will either go quickly or take a  
10 long time, and so you'll be the preference litigation. Even  
11 though you have, I think, generally realistic estimates  
12 between 11 and 23 percent recoveries, the low hanging fruit  
13 is probably going to be, you know, about \$50 million, and  
14 you need that 10 to sort of get there.

15 MR. SCHROCK: That makes sense, Your Honor, and  
16 know the preference firms are preparing to file most of the  
17 lawsuits. I think the court staff was in a bit of a state  
18 of shock. By the end, there's about 2,000 preference  
19 actions that are going to be filed here over the next couple  
20 of days.

21 THE COURT: All right. Okay. I asked on Friday  
22 if there were any other objections besides the 1129(a)(9)  
23 and (a)(11) objections, and no one spoke up other than the  
24 people who are here today and spoke up today.

25 In my review of the objections, there were a

1 couple that I don't think the Debtors' counsel told me were  
2 resolved when we started the hearing on Friday. But it  
3 seems to me that, looking through them -- looking through  
4 them, a couple might not be either resolved or have raised  
5 another issue. And I'm thinking of Santa Rosa Mall, who  
6 complains about some -- I didn't really understand the  
7 objection -- complained about a settlement and somehow it  
8 wasn't properly noticed.

9 Is anyone on for Santa Rosa Mall? They were the  
10 ones that hung up? Oh, the whole line just died? Yeah, you  
11 can do that? Thanks.

12 THE COURT: Okay. This is Judge Drain again. The  
13 line -- yes. This is Judge Drain again. When the call-in  
14 line died, I was starting to say that when the Debtors  
15 recited at the start of the confirmation hearing on Friday  
16 the plan objections that had been resolved and withdrawn, it  
17 appeared to me that most of the remaining objections dealt  
18 with either 1129(a)(9) or 1129(a)(11), which I've addressed.  
19 I have addressed the handful of objections that I've  
20 addressed today that didn't deal with those issues, and also  
21 addressed the U.S. Trustee's objection on Friday.

22 It appears to me in going through the other  
23 objections, there may be some objections by parties that  
24 have not been formally settled that do not pertain to the  
25 issues that I've already addressed. But I'm not sure, so

1 I'm going to just go through these quickly. And if you're  
2 on the phone, you should speak up to let me know if this is  
3 still a live objection that you want to argue.

4 The first one is the objection of Mario Aliano.

5 MS. HARRIS: Your Honor, this is Sharon Harris.

6 I'm on the phone on behalf of Mario Aliano.

7 THE COURT: Yes.

8 MS. HARRIS: And that's correct that my objection  
9 has not been addressed yet. If I could briefly just address  
10 the Court?

11 THE COURT: Okay.

12 MS. HARRIS: Mr. Aliano has a Class 4 general  
13 unsecured claim. And if the plan is confirmed, he would get  
14 a pro rata share, although not set forth in Section 4.4.  
15 Aliano voted to reject the plan and filed an objection,  
16 which is very narrow.

17 As a really quick background, he's the plaintiff  
18 in a civil action that obtained a judgment against Sears.  
19 Sears then appealed it, and there's an appeal bond to cover  
20 the judgment, plus one year of interest. We agreed to only  
21 seek the amount of the appeal bond, and the matter is fully  
22 briefed on appeal in the Illinois Appellate Court. And  
23 also, we have been working with Sears and Transform on a  
24 stipulation whereby Transform would be substituted in as the  
25 defendant in the Illinois action in place of Sears.



1           The issue is, we filed a motion to lift the  
2       automatic stay, which was previously presented to the court  
3       and continued to October 23rd. And the objection to the  
4       Chapter 11 plan is that if the plan is confirmed, then  
5       Aliano would only be able to get the pro rata share. And  
6       all the stays that are in effect would remain in full force  
7       and effect, which would effectively deny our motion to lift  
8       the stay without being heard on the merits. Plus, we'd like  
9       to make sure that our motion to lift the stay is heard on  
10      the merits, and that Aliano's civil action is carved out so  
11      the stay is not confirmed for his case.

12           THE COURT: So can the Debtors confirm that the  
13      stay motion will still be considered and that the bond  
14      doesn't go away as a result of the plan?

15           MR. FAIL: Your Honor, Garrett Fail,  
16      Weil, Gotshal for the record. The automatic stay will  
17      remain in effect, as will parties' ability to seek relief  
18      from the stay for cause. And we are working with counsel  
19      for Mr. Aliano to try to resolve it by stipulation with all  
20      the parties.

21           THE COURT: And the bond -- the bond will still be  
22      outstanding. This bond will still be posted. The  
23      confirmation doesn't --

24           MR. FAIL: The Debtors are taking no steps  
25      whatsoever with respect to it, so it'll be outstanding to

1 the extent it was outstanding.

2 THE COURT: Right. If there's some resolution  
3 among all the parties, then the bond will be involved in  
4 that. But the confirmation and effective date of the plan  
5 doesn't change the status of the bond.

6 MR. FAIL: Correct, Your Honor.

7 THE COURT: Okay. And similarly, it doesn't  
8 change the fact that if Mr. Aliano wants to proceed with a  
9 lift stay motion, he can do that.

10 MR. FAIL: Correct, Your Honor. We're hopeful  
11 that this'll be resolved. We've worked with Transform and  
12 with --

13 THE COURT: But even if it isn't.

14 MR. FAIL: Even if it isn't the motion will go  
15 forward and we'll deal with it at that point, Your Honor.

16 THE COURT: All right. So, I mean, I frankly  
17 wouldn't -- didn't view the plan as changing those rights.  
18 I think the record is clear on that effect. If you want to  
19 send language to that effect to Weil, Gotshal, you can do  
20 that. But I don't -- I didn't read the plan as somehow  
21 causing the bond to disappear or the stay motion to be moot.

22 MS. HARRIS: Okay. Thank you, Your Honor.

23 THE COURT: Okay.

24 MR. FAIL: Thank you, Your Honor.

25 THE COURT: Alpine Creations, I think is now --

1 it's clear that they are not a releasing party, and I  
2 believe the other objection was an 1129(a)(11) and a (9)  
3 objection.

4 MR. CAVALIERE: Your Honor, Rocco Cavaliere at  
5 Tarter Krinsky on behalf of Alpine Creations. I actually  
6 just got cutoff for five minutes and I just heard you  
7 speaking about my objection. I just signed back on.

8 THE COURT: Right. I just wanted to -- I just  
9 wanted to make sure that this is -- if there's anything left  
10 at this point on the objection that I haven't already ruled  
11 on or confirmed that the plan addressed?

12 MR. CAVALIERE: Your Honor, I think we had raised  
13 a minor objection with respect to our setoff recoupment, and  
14 there's some language that was circulated that is  
15 acceptable.

16 THE COURT: Okay.

17 MR. CAVALIERE: The only objections that remain  
18 are with respect to 1129(a)(9) and (11).

19 THE COURT: All right. So I've ruled on those,  
20 although I may have to fight a little bit at the end. Carl  
21 Island -- Ireland. Was that -- were the parties able to  
22 resolve that with some adequate protection language?

23 MR. SINGH: Your Honor, we're working on some  
24 language to stipulate to the discussion.

25 THE COURT: Replacement lien?

1 MR. SINGH: Yeah, exactly, to provide the  
2 replacement lien on all assets. I don't know if they're  
3 here, but we've exchanged language and we'll take care of  
4 that, Your Honor.

5 THE COURT: Okay. All right. I think  
6 (indiscernible) International was an 1129 objection, (a)(9)  
7 and (a)(11), if anyone's on if there's anything else that  
8 I'm missing.

9 PeopleReady wanted clarification that its contract  
10 is not deem objected since it's subject to the pending  
11 assumption notice. Has that been resolved?

12 MR. SINGH: Your Honor, that issue I don't think  
13 is open. I understand that Transform is negotiating  
14 directly with that counterparty.

15 THE COURT: All right. Well, so -- but as far as  
16 you're concerned, is it being deemed rejected under the plan  
17 or did you -- since there's a pending notice, I guess it's  
18 only when that's withdrawn that it is.

19 MR. SINGH: Correct. It's on an assumption notice  
20 that was proposed to be assumed, so the plan is not  
21 impacting the issue.

22 THE COURT: All right. So if someone -- if  
23 someone who's a party, a non-debtor contract party, and  
24 there's a pending assumption motion --

25 MR. SINGH: Right.

1 THE COURT: -- the plan doesn't reject.

2 MR. SINGH: Correct.

3 THE COURT: You would separate reject if their  
4 assumption notice is withdrawn.

5 MR. SINGH: That's correct.

6 THE COURT: Okay. All right. Santa Rosa Mall. I  
7 don't know if you heard me or whether the call conked out.  
8 I didn't -- some of the points have been resolved, i.e.  
9 Santa Rosa is not a releasing party. And I believe Santa  
10 Rosa -- well, I'm not sure if there's anything left, let me  
11 just put it that way, given the stipulation of voluntary  
12 dismissal of its claims in the adversary proceeding. Is  
13 there -- is counsel for Santa Rosa on the phone?

14 MR. CHICO: Yes, Your Honor. Good afternoon.  
15 Gustavo Chico on behalf of Santa Rosa.

16 THE COURT: Is there anything left to the  
17 objection, other than clarification that Santa Rosa is not a  
18 releasing party?

19 MR. CHICO: Right. That's basically what we're  
20 trying to get a clarification on that. We were often --

21 THE COURT: Well, that's clear. The Debtors are  
22 treating all parties who objected on the basis of a third-  
23 party release, or of course, who opted out, as a non-  
24 releasing party.

25 MR. CHICO: Right. And our concern was regarding

1 the injunction provision in Section 15.8 of the plan. The  
2 way it's drafted, it seems that parties will be -- Santa  
3 Rosa or any party will be enjoined from collecting or  
4 otherwise recovering by any means or manner, whether  
5 directly or indirectly. And since we're trying to pursue  
6 our claim against the insurance carriers from the insurance  
7 company, that that may be construed as an indirect action  
8 against the Debtor, and that's why we wanted that  
9 clarification.

10 THE COURT: All right. Well, I don't read the  
11 injunction as protecting third parties.

12 MR. SINGH: That's right, Your Honor. It's just  
13 for implementation of the plan as it relates to the Debtors.

14 THE COURT: As it relates to the Debtors.

15 MR. SINGH: Right.

16 THE COURT: I think maybe the thing to do is  
17 simply to send a letter and I'll put it on the docket to  
18 Santa Rosa confirming that.

19 MR. SINGH: Sure, we can do that, Your Honor.

20 THE COURT: Okay.

21 MR. CHICO: Thank you.

22 THE COURT: Okay. Edgewell Personal Care, in  
23 addition to the 1129(a)(9) and (11), objected on the basis  
24 that it's not clear whether its contract is assumed or  
25 rejected, and is arguing that it was a de facto assumption,

1 which isn't true -- I mean, there's no de facto assumption  
2 under the Bankruptcy Code. But can you clarify whether it's  
3 being assumed or rejected as of the confirmation date?

4 MR. SINGH: One second, Your Honor.

5 THE COURT: Okay.

6 MR. SINGH: Your Honor, my understanding with  
7 respect to this agreement is that it's not an executory --

8 THE COURT: Not an executory contract.

9 MR. SINGH: Right, as of today. So I think there  
10 may just be a dispute with respect to whether or not we've  
11 assumed or rejected it, which may have to happen.

12 THE COURT: All right. Well, you've done neither,  
13 right, at this point?

14 MR. SINGH: Right, we've done neither; that's  
15 exactly right.

16 THE COURT: So my ruling is, you have to either do  
17 -- let me back up. There's no such thing as a de facto  
18 assumption or rejection while you're in bankruptcy prior to  
19 the confirmation date.

20 MR. SINGH: Right.

21 THE COURT: If the plan is confirmed and it goes  
22 effective and you've done nothing, the contract, to the  
23 extent it's executory, rides through.

24 MR. SINGH: No, Your Honor. The plan says it's  
25 rejected if we've done nothing.

1 THE COURT: If you've done nothing.

2 MR. SINGH: Right.

3 THE COURT: Okay, correct. So if there's not been  
4 a notice of assumption, it will be deemed rejected.

5 MR. SINGH: Correct.

6 THE COURT: All right.

7 MR. SINGH: And I guess they can try to argue  
8 whatever they want later.

9 THE COURT: Well, you can't argue that there's a  
10 de facto assumption.

11 MR. SINGH: Right, because that issue, you've  
12 ruled on.

13 THE COURT: Right. See, among other authorities,  
14 In re. Child World, Inc., 147 B.R. 847 (Bankr. S.D.N.Y.  
15 1992), but also the plain language of Section 365. So I  
16 don't know if Edgewell's counsel is on the phone. But,  
17 consequently as a consequence of the plan's confirmation and  
18 there being no assumption notice, it's deemed rejected to  
19 the extent it is executory.

20 MR. SINGH: Right.

21 THE COURT: That's an open issue too, whether it  
22 is executory. Vehicle Service Group, in addition to  
23 1129(a)(9) and (a)(11) raise the third-party release point.  
24 But the Debtors have confirmed that it is being treated as  
25 opting out of the third-party release. Is counsel for VSG



1 on; is there any other issue that I missed here? Okay.

2 I think we briefly addressed this, but Team  
3 Worldwide Corporation, I think you've resolved it.

4 MR. SCHROCK: It's resolved, Your Honor, yeah.

5 THE COURT: Okay. And that's correct, Team  
6 Worldwide are you on? No, okay. All right. Is there any  
7 objection that I missed? Okay.

8 Let me go back then to the 1129(a) findings. I'm  
9 prepared to make each of the findings that I need to make  
10 under 1129(a) for confirmation of the plan. I've already  
11 ruled as far as the PBGC classification; that the plan  
12 complies with the other provisions of the Bankruptcy Code as  
13 far as classification is concerned. With regard to the only  
14 objection, I believe that was to classification, which was  
15 to the classification of the PBGC claim. There's clearly a  
16 reasonable basis for classifying that claim separately,  
17 given the PBGC's rights and position in the case.

18 I also find that the plan is proposed in good  
19 faith under 1129(a)(3). It's been proposed for a valid  
20 bankruptcy purposes, and I believe is intended to and does  
21 have the best chances of maximizing recoveries for creditors  
22 here, and has been carefully thought through to do so in a  
23 way that is fair in light of all the creditors' rights under  
24 the applicable agreements and the Bankruptcy Code, including  
25 the DIP agreement and order, the cash collateral order and

1 the carveout provided for in it, including the language that  
2 I've already referenced regarding the placement of the  
3 carveout amounts in a segregated account and in trust solely  
4 for the use of the professionals.

5 The only other objections on 1129(a) grounds were  
6 on the requirement 1129(a)(9) that to be confirmed, a plan  
7 must accept, to the extent of a particular claim has agreed  
8 to a different treatment of such claim, provide that, with  
9 respect to the claim of a kind specified in Section  
10 507(a)(2) or 507(a)(3) of this title. On the effective date  
11 of the plan, the holder of such claim will receive on  
12 account of such claim cash equal to the allowed amount of  
13 such claim.

14 1129(a)(11) provides that the plan proponent must  
15 show, as it must show with regard to all the 1129(a)  
16 provisions by a preponderance of the evidence that, quote,  
17 "Confirmation of the plan is not likely to be filed by the  
18 liquidation or the need for further financial reorganization  
19 of the Debtor or any successor to the Debtor under the plan,  
20 unless such liquidation or reorganization is proposed in the  
21 plan.

22 I'll note that Section 1129(a)(9) does not require  
23 that confirmation of the plan be immediately followed by the  
24 effective date of the plan. It simply requires that on the  
25 effective date of the plan, the plan provides for payment in

1 cash of the allowed amount of administrative expenses, with  
2 the exception of those where the holder has agreed to a  
3 different treatment of such claim.

4 Here, as with many plans, the Debtor has proposed  
5 -- the Debtors are proposing that the Court confirm the  
6 plan, knowing that there will be a hiatus while the Debtor  
7 is still a debtor-in-possession until the plan goes  
8 effective. That is because there is a projected shortfall,  
9 as of today, of between \$36.5 and \$104.5 million of cash  
10 payments necessary to implement the plan, including payment  
11 of projected allowed administrative expenses -- priority  
12 tax, secured claims, and priority non-tax claims -- in light  
13 of the Debtors' projection of sources beyond those that are  
14 in hand.

15 Having reviewed the Declarations, including the  
16 supplemental Griffith Declaration in support of confirmation  
17 of the plan, I find that the witnesses testimony, including  
18 on cross-examination, is credible and that the projections  
19 are reasonable. Nevertheless, they are just projections  
20 and, as I said, they show a shortfall of between \$36.5 and  
21 \$104.5 million if the plan were to go effective promptly  
22 upon entry of the confirmation order, i.e. later this week,  
23 for example.

24 Based on the total sources, however, I believe  
25 that it is reasonable to project substantial recoveries in a

1 relatively brief period on the Debtors' preference claims  
2 and/or settlements of administrative expenses that would  
3 include a preference claim release in return for a reduction  
4 of the administrative claim. That would reduce that  
5 shortfall dramatically.

6 I also believe, based on Mr. Transier's  
7 Declaration, which was uncontroverted in my own review of  
8 the Complaint attached to it, that the Debtors have  
9 substantial potential claims against the defendants in that  
10 adversary proceeding, which clearly will take longer to test  
11 and potentially obtain recoveries on, but -- which have been  
12 treated throughout these cases by the Debtors and the  
13 Creditors' Committee, both represented by well-informed and  
14 sophisticated counsel, as claims that should not be settled  
15 for relatively small amounts.

16 However, that litigation, I believe, unless there  
17 is a meaningful settlement of it in the relatively near  
18 term, I think will take a substantial amount of time to  
19 resolve, potentially two to four years, and I am reluctant  
20 to delay the effective date of this plan that long.

21 So I am focused on the claims' side of the balance  
22 sheet, the administrative claims' side of the balance sheet  
23 and the other 100-cent dollar amounts that would need to be  
24 paid, as well as the other assets besides the so-called ESL  
25 litigation. Based on the record before me and including the

1 additional exception from the carveout that I've previously  
2 discussed on the record of another \$9 million, I believe  
3 that the likelihood of satisfying Section 1129(a)(9) in the  
4 relatively near term, i.e. in a matter of a few months, is  
5 established.

6 I have additional comfort, besides the concession  
7 I've asked of the professional here, in that conclusion from  
8 the claims' resolution program that I am also approving  
9 today and then would become effective today, which would  
10 provide for incentives to settle claims for less than 100  
11 cents on the dollar by administrative expense creditors.

12 It has been argued that that settlement has been  
13 announced too promptly for proper review. And, secondly,  
14 that the, in essence, third tier of the settlement or  
15 sandwich group in the settlement who neither affirmatively  
16 opt out or opt in, are not really -- or I couldn't find  
17 would be really agreeing, for purposes of 1129(a)(9), to  
18 their treatment under the settlement.

19 As to the first point, I do not believe that the  
20 settlement requires more notice to parties-in-interest  
21 generally. I say so because it appears to me to be a  
22 reasonable resolution of a relatively simple issue, which is  
23 that the Debtors lack sufficient cash to pay administrative  
24 expense claims in full, but have agreed on a reasonable  
25 mechanism supported by informed counsel on both sides -- and

1 that includes the Official Unsecured Creditors Committee --  
2 as to the allocation of a meaningful amount of cash in  
3 return for a discount for opting in to the settlement and a  
4 second tier of meaningful cash, albeit it a later tier, for  
5 doing nothing and obtaining a 5 percent greater maximum  
6 recovery, as well as the option clearly to opt out and  
7 simply wait for a full 100 percent recovery.

8           Given those options for administrative expense  
9 creditors, I don't believe any administrative expense  
10 creditor can criticize the settlement. They have the option  
11 either to be bound by it or not be bound by it. And,  
12 therefore, it's neither too good nor too poor, because both  
13 options are available to them under it. And I believe now,  
14 they have more than sufficient time to review it to make  
15 that choice, i.e. the 33 days plus the disclosure, as  
16 modified on the record today, of the risk factors.

17           The second objection, as I noted, is that I should  
18 not find that parties who neither affirmatively opt in nor  
19 affirmatively opt out can be said to have agreed to the  
20 settlements' treatment of that group for purposes of Section  
21 1129(a)(9). The agreement here is not the deemed agreement  
22 that I've consistently found is proper to find, if there's  
23 proper disclosure, under a plan, which has its own specific  
24 treatment under Section 1141 of the Bankruptcy Code, i.e.  
25 it's binding, the terms of the plan are binding on all

1 parties.

2           The agreement here is an agreement under normal  
3 contract law principles. So the issue for me is can one  
4 agree under normal contract law principles by implication or  
5 non-action. This issue was dealt with by Bankruptcy Judge  
6 Bernstein in In re. Teligent, Inc., 282 B.R. 765 (Bankr.  
7 S.D.N.Y. 2002), where he determined under those  
8 circumstances that administrative expense creditors who did  
9 not return a consent form would be deemed to agree, inferred  
10 to agree, having been given the option to either object or  
11 to affirmatively agree.

12           Judge Bernstein concluded with appropriate  
13 disclosure, as there was here in an effort to provide enough  
14 notice to parties to make a decision, that he could infer  
15 agreement under applicable non-bankruptcy law, including the  
16 Restatement (Second) of Contract, Section 69-1, which sets  
17 forth exceptions to the rule that ordinarily an offeror  
18 cannot treat silence or inaction as an acceptance. The  
19 exceptions where the offeree will be deemed to accept the  
20 offer through silence are when he has a duty to speak and,  
21 second, when the offeree's silence may constitute acceptance  
22 where the offeror has stated his intention or given the  
23 offeree reason to understand that he will do so, and the  
24 offeree, in remaining silent and inactive, intends,  
25 therefore, to accept the offer.

1           That latter principle, I believe, applies here,  
2           although, frankly, Judge Bernstein applied the former too,  
3           finding a duty to speak in the context of plan confirmation  
4           where it would be clear to the party that the plan was being  
5           confirmed in reliance on that construct, which is clearly  
6           the case here because it is part of my 1129(a)(11) analysis  
7           that at least some parties will neither opt in nor  
8           affirmatively opt out of the settlement.

9           There's not a lot of case law on this issue, at  
10          least one case. In re. Real Wilson Enterprises,  
11          (indiscernible) B.R. LEXIS 3997 (Bankr. E.D. Calif.  
12          September 23, 2013) has disagreed with Teligent. But I  
13          believe it does so under quite different facts where the  
14          choice was not laid out in a way that was laid out in  
15          Teligent or here. In re. Global Aircraft Solutions, Inc.,  
16          2011 B.R. LEXIS 2063 (BAP 9th Circuit, May 11, 2011) relied  
17          on the Restatement provision that I previously cited for a  
18          deemed consent. And there is precedent from the Toys 'R Us  
19          case where a similar program, albeit one without a lengthy  
20          opinion, but a bench ruling in favor of the same type of  
21          notice and deemed consent.

22          Given that the Debtors are relying upon a  
23          different treatment where there is silence than either of  
24          the other two options where there was affirmatively  
25          reaction, can that reliance carry through in this case,



1 including in respective rulings on feasibility. I believe  
2 that under these circumstances, I can find agreement under  
3 normal contract law principles.

4 So the only other finding I need to make is  
5 against entities that have not objected to confirmation,  
6 which is the cramdown finding, for those classes that have  
7 not accepted the plan and certain Debtors. It's clear from  
8 the plan that no junior class is receiving any property  
9 under the plan; and, consequently, the plan satisfies the  
10 requirements of the cramdown of the unsecured non-voting  
11 classes, as well as the equity classes.

12 I had I believe already ruled on the other  
13 objections by the United States Trustee, and I will not  
14 reiterate my ruling here on that, other than to note that  
15 for the same reasons that I previously ruled, and certain  
16 colleagues of mine have previously ruled. I believe that in  
17 connection with the plan with a disclosure statement ballot  
18 and plan itself alert creditors that if they do not opt out  
19 of a third-party release, they will be bound by that release  
20 means that if they do not object to the release, they are  
21 bound by the terms of the plan as provided in 11 U.S.C.  
22 Section 141 of the Bankruptcy Code, i.e., the plan is more  
23 than just a contract by analogy; it has its own statutory  
24 and common law res judicata effects, including with respect  
25 to any provision, including a release provision, as long as

1 the release provision is drafted clearly and the option to  
2 opt out is clear.

3 Here, the Debtors have treated not only those who  
4 affirmatively opted out, but those who have actually  
5 objected to confirmation on the basis of the third-party  
6 releases, having opted out of the release. The other  
7 parties who have done nothing should be bound by the plan,  
8 given the clarity of the release and the fact that it is not  
9 unduly broad and, instead, is carefully tailored and has  
10 authority for that proposition. I'll simply refer to the  
11 Debtors' reply memorandum of law, which cites my prior  
12 rulings on that topic, as well as rulings by Judge Lane and  
13 Judge Chapman.

14 So I think you need to make some relatively modest  
15 changes to the confirmation order. And you don't need to  
16 formally settle those -- that draft, but you should  
17 circulate it perhaps a day before the submission of it to  
18 chambers.

19 I guess I should also say, although I said this  
20 during oral argument on Friday. Certain objectors have  
21 questioned why one should proceed to confirmation now, as  
22 opposed to waiting until more cash is brought into the  
23 estate. In my view, the Debtors and the Committee are  
24 entirely correct in seeking confirmation at this point. It  
25 has helped to provide enough certainty and clarity for, at

1 this point, the administrative expenses creditors primarily  
2 to be ready to focus on a resolution of their claims, and  
3 has further, I believe, and materially so, reduced the  
4 continuing costs of these cases where uncertainty inevitably  
5 would lead to more issues to be litigated, raised and  
6 disposed of, with an eye to positioning the parties for an  
7 ultimate confirmation fight. It's better to have had that  
8 fight over the last two days of hearings and be in a  
9 position now where the Debtors have a clear path to going  
10 effective.

11 MR. SCHROCK: Thank you. Thank you very much,  
12 Your Honor. On behalf of the Debtors and the Board, the  
13 restructuring committee, and all the constituents, we really  
14 do appreciate it.

15 I have one last just housekeeping item. It's not  
16 a matter for today. But the ad hoc administrative  
17 claimants, you know, we've incurred, you know, roughly  
18 \$700,000 in fees and, you know, getting to the consent  
19 program here. The Debtors and the Committee did agree that  
20 they would support their motion for substantial contribution  
21 up to \$400,000. I know that's not up for today, but I did  
22 want to note that for the record because it is certainly  
23 part of our agreement.

24 THE COURT: Okay. Well, as we made clear, until  
25 the plan goes effective, all of the rules and principles of

1 an ongoing Chapter 11 case applies, so I'm sure I'll have  
2 that application in due course. Okay. All right. Thank  
3 you.

4 MR. SCHROCK: This is Ms. Marcus. If we could  
5 just very quickly, I'm sorry.

6 THE COURT: That's all right.

7 MS. MARCUS: Sorry. Sorry to keep everybody here  
8 any longer. Just very quickly, Your Honor. As you know, we  
9 had the 1114 hearing on Thursday.

10 THE COURT: Right.

11 MS. MARCUS: Your Honor ruled we submit an order.

12 THE COURT: Right. I sent an order in to be  
13 entered last night.

14 MS MARCUS: Perfect. We haven't seen it yet.

15 THE COURT: I read Mr. -- well, I sent in, like,  
16 60 orders over the weekend, so they've been busy. They'll  
17 be entering it soon. I read Mr. Gerson's letter, and I had  
18 a very minor change to the order in light of the letter, but  
19 I didn't redo the settlement. And I think that was the  
20 problematic aspect of the letter is there was some aspects  
21 of the letter that really sought to redo that settlement,  
22 and I wasn't going to do that.

23 MS. MARCUS: Thank you, Your Honor.

24 THE COURT: Okay.

25

1 (Whereupon these proceedings were concluded at  
2 05:27 PM)  
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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing  
transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: October 9, 2019

[& - 2:00]

Page 1

<b>&amp;</b>	<b>10601</b> 1:14	<b>146</b> 51:20 56:13	<b>2003</b> 91:20,21
<b>&amp;</b> 3:3,12 4:1,8,15 5:1 6:14 7:2	<b>11</b> 2:3 20:7 36:9 86:8 103:5 165:12 165:23 166:18 168:4 170:2,18 171:7 173:23 175:23 177:14 183:6,16 184:21 187:1	66:13 67:6 79:17 95:12 96:7 <b>147</b> 175:14 <b>15</b> 26:20 111:25 112:2 150:8,24 156:12 <b>15.8</b> 173:1 <b>150</b> 149:11,19 150:25 152:5 159:17 162:3 <b>16</b> 21:13 22:4 <b>1633</b> 7:4 <b>16th</b> 19:6 21:11 36:2,4,10 <b>17</b> 150:21 <b>174</b> 26:7 <b>17th</b> 19:3 20:9 21:13,16 22:4 76:5 <b>18</b> 54:23 150:21 <b>18-23538</b> 1:3 <b>180</b> 157:24 <b>19</b> 123:5 <b>1966</b> 92:4 <b>1981</b> 92:19 <b>1988</b> 91:9 <b>1992</b> 175:15 <b>1:07</b> 1:17	<b>2005</b> 162:20 <b>2006</b> 93:19 <b>2010</b> 17:22 <b>2011</b> 183:16,16 <b>2013</b> 183:12 <b>2015</b> 149:18 150:1 150:19 151:3 <b>2016</b> 149:19 <b>2017</b> 91:19 149:19 <b>2018</b> 28:10 150:21 151:3 <b>2019</b> 1:16 18:23 19:3 20:9 21:11 21:13,14 22:4,4 27:8 189:25 <b>2063</b> 183:16 <b>21</b> 11:2 <b>22</b> 62:17 <b>23</b> 77:16 165:12 183:12 <b>239</b> 93:18 <b>23rd</b> 168:3 <b>24</b> 23:12 24:16 26:20 128:1 <b>248</b> 1:13 <b>249</b> 94:17 102:3 <b>25</b> 14:23 84:22,25 86:5,6,22 87:5 107:25 108:10,14 112:6 133:16 135:4 138:9 139:4 139:22 140:16 141:2,13 142:6,19 150:15 157:25 <b>250</b> 5:18 100:8 102:3 <b>261</b> 19:12 <b>27th</b> 6:9 <b>28</b> 4:10 <b>282</b> 182:6 <b>2:00</b> 137:25
<b>0</b>		<b>2</b>	
<b>05:27</b> 188:2			
<b>1</b>			
<b>1</b> 10:23 11:3,25 12:5 31:8 44:5 59:13 82:17 91:9 162:12 <b>1,000</b> 89:11 <b>1,130,000</b> 10:18 <b>1.3</b> 142:4 <b>1.5</b> 10:20 11:21 <b>1.85</b> 77:17 <b>10</b> 14:23 36:9 49:13 86:7 87:6 92:19 99:14 124:21 126:7 160:18 161:17 162:9 163:4 165:14 <b>100</b> 49:14 54:13 71:21 72:10,11,14 77:3,5 160:14,15 179:23 180:10 181:7 <b>100,000</b> 75:15 <b>10005</b> 4:11 <b>10006</b> 5:4 <b>10007</b> 5:19 <b>10016</b> 6:17 <b>10018</b> 7:13 <b>10019</b> 7:5 <b>10036</b> 3:6 <b>101</b> 6:9 <b>10153</b> 3:15 <b>10158</b> 4:18 <b>10178</b> 6:10 <b>104.5</b> 161:16 178:9,21	<b>11.6</b> 85:7 <b>11.6.</b> 85:15 <b>111</b> 5:10 49:20 <b>1114</b> 187:9 <b>1122</b> 104:6 <b>1123</b> 104:7 <b>1129</b> 96:6 101:13 103:4,5 104:9,21 165:22 166:18,18 170:2,18 171:6 173:23 175:23 176:8,10,19 177:5 177:6,14,15,22 180:3,17 181:21 183:6 <b>113</b> 51:6 <b>1141</b> 181:24 <b>1145</b> 131:19 <b>11501</b> 189:23 <b>11th</b> 156:22 157:18,19 <b>123</b> 92:19 <b>125</b> 64:19 <b>126</b> 24:4 <b>127</b> 92:19 <b>13</b> 24:14 <b>135</b> 150:9,12 151:1 <b>136</b> 64:9 <b>14</b> 26:8,20 <b>140</b> 56:12 <b>1401</b> 91:20 <b>141</b> 184:22	<b>2</b> 44:5 77:13 82:18 177:10 <b>2,000</b> 165:18 <b>2.7</b> 77:15,17 <b>2.7.</b> 77:14 <b>2.77</b> 52:22 77:15 <b>20</b> 11:2 15:16,20 111:5 112:1 125:7 125:15 139:2 <b>200</b> 4:3 94:5 <b>2000s</b> 64:22 <b>2002</b> 182:7	

<b>21</b> 89:24	<b>5</b>	<b>7</b>	177:6,22 180:2,3 180:17 181:21 189:25 <b>9.2</b> 59:10 65:24 85:5 86:20 <b>9.2e</b> 79:23 <b>90</b> 6:16 31:5,10 44:4 99:10 <b>9019</b> 93:7 <b>91</b> 34:8 <b>93</b> 35:1 <b>97.5</b> 56:3 <b>99</b> 37:12 <b>9th</b> 18:23 183:16
<b>3</b>	<b>5</b> 44:4 112:2 181:5 <b>5/8th</b> 17:22 <b>50</b> 53:22 54:3 65:24 84:23 90:15 156:1,23 157:3 159:21 161:20 162:13,15 164:12 164:13 165:13 <b>50,000</b> 139:9 <b>503</b> 11:25 <b>507</b> 106:7 119:22 121:25 134:3 136:18 141:16 177:10,10 <b>5144</b> 19:12 <b>515</b> 91:8 <b>518</b> 91:9 92:13 <b>53</b> 36:10 <b>5332</b> 156:24 <b>54</b> 31:7 <b>55</b> 160:20 <b>56</b> 32:19 <b>565</b> 91:18 100:7 <b>57</b> 25:20 32:5 115:25 130:7 <b>58</b> 25:20 <b>585</b> 92:20 <b>59</b> 15:12 25:20	<b>7</b> 1:16 5:17 65:22 77:13 80:23,25 85:5 161:17 <b>7.02</b> 52:20 <b>7.6</b> 53:3 54:8 59:11 85:1,20 86:21 <b>7.7</b> 85:6,14 86:4 90:13 <b>70</b> 53:18 54:3 160:19 <b>700,000</b> 186:18 <b>710</b> 91:19 <b>716</b> 91:19 92:20 <b>717</b> 93:2 <b>719</b> 100:7 <b>72</b> 20:6 24:13 <b>75</b> 13:4,14 51:16 51:22 52:1,6 54:6 55:3 86:4 100:19 <b>750</b> 100:8 <b>75201</b> 4:4 <b>765</b> 182:6 <b>767</b> 3:14 <b>792</b> 162:20	<b>a</b> <b>a&amp;a</b> 6:4 <b>a11</b> 81:19 <b>a9</b> 81:19 <b>ab</b> 37:3 <b>abilities</b> 41:10 <b>ability</b> 38:23 43:23 56:16,23 62:18 64:13 114:18 129:23 136:17 168:17 <b>able</b> 32:10,12 33:9 41:22 50:12 56:21 62:22 65:20 67:23 118:3 140:23 141:18 168:5 170:21 <b>absolute</b> 80:12 98:4 <b>absolutely</b> 141:5 162:17 <b>abusive</b> 58:23 <b>academic</b> 78:20 <b>accept</b> 94:16 103:15 125:25 177:7 182:19,25 <b>acceptable</b> 170:15 <b>acceptance</b> 26:12 182:18,21
<b>31</b> 86:7 <b>30</b> 22:10 53:20 125:17 126:5 <b>30.9</b> 86:8 <b>300</b> 1:13 4:3 189:22 <b>31</b> 29:22 86:3 91:21 <b>31st</b> 7:4 <b>329</b> 123:5 <b>33</b> 13:11 86:11 181:15 <b>330</b> 189:21 <b>332</b> 162:19 <b>356</b> 93:18 94:17 100:8 102:3 <b>36</b> 86:11 161:20 <b>36.5</b> 161:15 178:9 178:20 <b>365</b> 175:15 <b>369</b> 92:3 <b>39</b> 30:17 <b>390</b> 93:13 <b>3997</b> 183:11	<b>6</b> <b>6</b> 17:22 24:15 26:9 32:6 33:6 136:14 <b>60</b> 25:20 82:19 157:3 164:10 187:16 <b>600</b> 106:4 <b>605</b> 4:17 <b>60606</b> 5:11 <b>62</b> 33:24 <b>620</b> 7:12 <b>65</b> 160:15,20 <b>69-1</b> 182:16	<b>8</b> <b>8</b> 101:13 153:9 <b>80</b> 13:6,17 18:25 31:5,10 54:21 56:3 57:4 99:10 <b>800</b> 18:25 56:4 <b>845</b> 92:3 <b>847</b> 92:3 175:14 <b>860</b> 91:8 92:13 <b>89</b> 89:25	
<b>4</b>		<b>9</b>	
<b>4</b> 85:16 142:4 167:12 <b>4.4.</b> 167:14 <b>40</b> 28:13 <b>400,000</b> 186:21 <b>41</b> 28:23 <b>42</b> 54:20 <b>424</b> 93:13 <b>452</b> 93:12 <b>462</b> 93:12 <b>478</b> 93:12		<b>9</b> 96:6 103:4 162:12 163:7 165:22 166:18 170:2,18 171:6 173:23 175:23	



[accepted - agreement]

Page 3

<p><b>accepted</b> 33:18 92:22 101:11,16 102:1 184:7 <b>access</b> 112:22 <b>accomplish</b> 56:21 <b>account</b> 12:14 14:7 44:22 48:3 50:15,20 65:6 66:10 84:11 86:22 98:21,24 102:3,16 103:8 112:3 116:5 116:5,9 130:5,6 131:9 132:4,7 133:17 142:22 143:20 162:24 163:5,9 164:13 177:3,12 <b>accountant</b> 30:5 <b>accountants</b> 33:14 <b>accounting</b> 28:19 32:1,7,15,17,20 32:22 33:2,7,18 33:20 34:7 36:13 36:16 41:2,4 76:10 <b>accounts</b> 15:3 36:22 49:18,19 50:15,19 79:4 112:23 <b>accurate</b> 30:3,3 36:19 39:17 99:11 151:18 189:4 <b>act</b> 63:24,25 74:14 80:13 <b>acting</b> 63:25 74:21 101:6 <b>action</b> 18:19 105:9,18 167:18 167:25 168:10 173:7 182:5 <b>actionable</b> 110:12</p>	<p><b>actions</b> 18:22 165:19 <b>active</b> 19:22 <b>activities</b> 28:20 60:6,11 111:7 <b>activity</b> 30:5,15 30:16,25 31:11 32:11,13 34:5,7 34:12,16 35:5,6 35:25 40:13 <b>actual</b> 63:23 66:19 73:19 88:19 <b>ad</b> 6:15 156:16 157:4 186:16 <b>add</b> 15:18 67:20 79:17 87:6 96:8 138:13 148:20,25 154:7 <b>added</b> 14:13 33:3 152:22 162:13 <b>adding</b> 33:5 86:6 <b>addition</b> 11:6 93:15 95:10 97:24 141:19 142:5 173:23 175:22 <b>additional</b> 10:23 11:3 15:16 22:11 22:13 59:12 74:8 76:7 158:7 180:1 180:6 <b>address</b> 87:10 109:17 129:13 167:9 <b>addressed</b> 18:10 47:9 166:18,19,20 166:21,25 167:9 170:11 176:2 <b>adequate</b> 170:22 <b>adequately</b> 32:8 102:23 <b>adjectives</b> 148:14 148:14</p>	<p><b>adjustments</b> 29:23,25 102:6 <b>admin</b> 6:15 66:19 68:13 79:17 159:10 <b>administrative</b> 10:19 11:21 12:25 13:5,7,9,16 20:17 21:25 23:8 56:12 66:14 67:3 68:16 75:10 76:24 78:22 82:6 83:7 95:13 96:3,4,5,7,8,17 100:13 109:4,25 111:2 113:8 116:10 117:16 118:2 121:11 131:13,14 143:25 144:9,24,25 146:20 153:20 154:13,14 157:25 158:13 159:2,9,16 160:16 165:4 178:1,11 179:2,4 179:22 180:11,23 181:8,9 182:8 186:1,16 <b>administratively</b> 22:25 23:2 78:12 83:7 96:13 107:5 <b>admits</b> 50:25 <b>admitted</b> 31:25 80:15 <b>admittedly</b> 131:15 <b>advance</b> 124:18 126:5 <b>adversary</b> 149:13 172:12 179:10 <b>adverse</b> 55:23 85:22 92:25 120:3 127:1</p>	<p><b>adversely</b> 92:24 <b>advocate</b> 17:10 <b>affairs</b> 92:11 99:23,25 <b>affect</b> 31:25 <b>affiliated</b> 2:4 <b>affirmatively</b> 13:9 13:12 94:11 97:12 180:15 181:18,19 182:11 183:8,24 185:4 <b>afternoon</b> 10:2,4 61:19 67:18 70:8 105:23 106:1 129:17,19 172:14 <b>agent</b> 74:7 <b>aggregate</b> 13:3,17 31:3 42:11 <b>aggregated</b> 63:1 <b>aggressive</b> 17:10 <b>ago</b> 164:5 <b>agree</b> 38:8 79:15 80:7 88:11 89:9 89:12 105:2 108:7 141:15 151:11 182:4,9,10,11 186:19 <b>agreed</b> 15:16 19:10,16 20:10 38:12 58:12 80:14 96:3 167:20 177:7 178:2 180:24 181:19 <b>agreeing</b> 27:9 60:1 80:3 180:17 <b>agreement</b> 10:16 19:1 59:18,25 67:23 88:9 89:14 104:24 110:8 113:13 114:1,12 114:17 116:9 125:18 130:10 131:22 136:20</p>
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137:25 138:16 158:5 174:7 176:25 181:21,21 182:2,2,15 184:2 186:23 <b>agreements</b> 28:6 98:17 176:24 <b>agrees</b> 11:6 95:11 <b>ahead</b> 29:15 109:4 136:2 137:8 144:5 <b>aiello</b> 8:14 <b>aimed</b> 137:3 <b>aircraft</b> 183:15 <b>airways</b> 91:18 92:20 93:15 100:6 <b>akin</b> 3:3 12:7 70:9 108:13 <b>al</b> 10:3 <b>alana</b> 8:11 <b>albanese</b> 8:7 <b>albeit</b> 77:16 93:21 181:4 183:19 <b>alert</b> 184:18 <b>aliano</b> 167:4,6,12 167:15 168:5,19 169:8 <b>aliano's</b> 168:10 <b>align</b> 158:13 <b>alix</b> 8:18 <b>allegedly</b> 19:14 <b>allen</b> 9:1 <b>allocation</b> 181:2 <b>allow</b> 18:25 60:19 128:4 <b>allowed</b> 10:18 13:4,6,14,23,24 54:20,23 96:2,4 114:13,14,18,21 117:22 129:23 132:10 134:11 143:2 158:1 165:4 165:6 177:12 178:1,11	<b>allows</b> 78:5 128:2 141:7 <b>alluded</b> 70:23 <b>alpine</b> 169:25 170:5 <b>alternative</b> 103:2 <b>alves</b> 8:10 <b>ambiguous</b> 153:25 154:1 <b>amended</b> 2:2 19:6 20:5 <b>amendments</b> 126:25 <b>amount</b> 13:5,6,14 13:23 24:22 42:11 46:2,4 55:13,17 58:1 60:9 68:18 84:9 85:22 86:10 86:25 87:2 89:2 99:5 102:9 106:4 135:5 150:17 152:18 156:19 157:7,16,23,25 162:14 163:6 164:14 165:6 167:21 177:12 178:1 179:18 181:2 <b>amounts</b> 36:7 45:18 46:9 156:23 177:3 179:15,23 <b>amplify</b> 113:11 <b>amw</b> 6:6 <b>analogy</b> 184:23 <b>analyses</b> 28:21,22 103:5 <b>analysis</b> 12:11 21:3,3 22:11,13 22:14,16,17,20,21 23:1,4 25:13 28:8 28:13,14,17,25 31:5,9 34:10,11 34:15,17,18,20	35:6,18,18,21,22 39:8 51:3,10,14 52:17 62:4,22 65:11 71:11 76:4 76:9,13 82:11 85:25,25 93:9,10 93:16,17,22 94:1 98:7 99:19 103:5 103:10,16,18 104:1 152:3 161:24,24,25 183:6 <b>analyze</b> 34:6 36:25 <b>andrew</b> 8:20 <b>andrews</b> 6:2 <b>anker</b> 5:21 145:21 145:21 146:1,4,6 146:8,11,13,15,18 146:22,25 147:4 147:11,20 148:2,5 148:19 149:6 151:7,9,13,17,20 151:25 152:12,15 152:21 153:2 <b>anker's</b> 152:7 <b>announce</b> 10:9 <b>announced</b> 14:3 18:24 111:3 180:13 <b>annual</b> 33:11 149:18 <b>answer</b> 20:14,18 20:21,22,24 21:9 21:17,17,21,22,22 22:8,10,14,19 23:3,14,18,18,20 24:9,16,20,24 25:5,8,9,12,13 26:10,15,18 28:16 29:1,24 30:3,14 30:25 31:14,19 32:9,13,17,22	33:5,12,13,21 34:2,3,13,17 35:1 35:3,9,13,19,22 35:25 36:2,18,20 37:15,18,22 38:11 38:21,24 39:1,7,8 39:12,17,20 40:3 40:8,11,13,17,20 40:25 41:5,15 50:3,6,15,16,21 51:9,11,24,25 52:2,7,12,15 66:11 76:8 117:12 <b>answered</b> 23:17 34:1 51:24 <b>answering</b> 105:14 <b>anthony</b> 8:13 <b>anticipated</b> 124:18 <b>anticipation</b> 67:8 <b>antiquated</b> 31:24 32:9,16,21 33:3,7 <b>anybody</b> 13:21 17:2,24 27:15,23 28:4 38:8 52:13 56:23 127:1 <b>anyone's</b> 149:3 171:7 <b>anyway</b> 29:15 86:24 87:4 104:18 <b>apart</b> 63:16 64:18 <b>apologize</b> 16:16 145:23 153:17 <b>apparently</b> 41:23 55:10 96:11 109:15 <b>appeal</b> 97:17 106:8 115:16 116:15 122:14 132:23 134:3 136:16 137:7,11 137:12,14,15,16 141:23 142:24
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

143:3,5,10 146:15 167:19,21,22 <b>appealed</b> 167:19 <b>appeals</b> 114:15 <b>appear</b> 17:23 97:1 98:5,11 102:11 108:11 <b>appearance</b> 161:25 <b>appeared</b> 29:19 30:3 166:17 <b>appears</b> 21:25 26:1 96:15 100:17 101:17 104:1,14 108:13 113:8 124:1 166:22 180:21 <b>appellant</b> 146:10 146:12 <b>appellate</b> 143:15 167:22 <b>apples</b> 90:16 <b>applicable</b> 93:10 123:23 176:24 182:15 <b>application</b> 162:7 187:2 <b>applications</b> 161:2 <b>applied</b> 52:6 65:3 183:2 <b>applies</b> 150:22 183:1 187:1 <b>apply</b> 92:5,20 93:7 97:22 <b>applying</b> 93:9,16 <b>appoint</b> 67:24 <b>appreciate</b> 17:17 77:12,23 83:14 164:21 186:14 <b>approach</b> 84:13 84:16 93:16	<b>appropriate</b> 24:1 38:7 56:10 57:9 73:12 84:14 88:13 92:6 104:11 109:5 111:8,22 123:3 148:25 149:17 163:5 182:12 <b>approval</b> 106:17 <b>approve</b> 18:13,18 53:11 57:21 58:23 59:2 61:9 65:25 67:13 79:24,25 94:12 100:5 102:6 126:15 127:11 <b>approved</b> 18:11 53:6 102:19 107:12 153:22 157:19 <b>approves</b> 80:8 <b>approving</b> 68:13 94:6 126:9,11,14 128:23 180:8 <b>approximate</b> 106:4 <b>approximately</b> 62:5 138:9 139:22 140:15 152:20 162:13 <b>approximation</b> 52:5 <b>april</b> 19:3 20:9 21:13,16 22:4 27:9 76:5 <b>area</b> 41:24,25 <b>areas</b> 20:1 <b>arguably</b> 104:7 <b>argue</b> 55:6 167:3 175:7,9 <b>argued</b> 180:12 <b>arguing</b> 64:17 133:9 173:25 <b>argument</b> 17:20 18:6 62:11 64:12	94:2 101:8 130:23 149:2 154:18 185:20 <b>argumentative</b> 39:12 <b>arguments</b> 11:25 61:23 65:2 89:23 106:23 <b>arises</b> 38:2 146:19 <b>arlene</b> 8:10 <b>arm's</b> 97:20 <b>ashuraey</b> 8:22 <b>aside</b> 29:1 78:10 85:21 112:9 113:3 133:16 142:22 <b>asked</b> 14:20 19:24 20:6 21:8,13,13 21:18,19 22:1 23:13 26:8 28:13 30:17 31:7 34:1,8 34:25 36:8 37:12 37:13 49:20 51:5 51:20,24 106:11 124:17 125:5 127:15 145:15 165:21 180:7 <b>asking</b> 21:5 23:18 63:6 122:22 131:18 158:2,3 <b>aspect</b> 88:12 103:13 116:13 187:20 <b>aspects</b> 187:20 <b>assert</b> 69:20 87:14 88:17 114:19 134:10 136:18 <b>asserted</b> 10:21 11:20 12:16 <b>assertible</b> 118:2 <b>asserting</b> 54:6 68:18 <b>assertion</b> 24:2 51:13 56:19	<b>asserts</b> 23:22 51:15 <b>assess</b> 150:6 <b>assessing</b> 52:11,14 <b>assessment</b> 11:17 11:18 109:15 147:18 <b>asset</b> 70:1 83:23 117:4 <b>assets</b> 14:14 15:2 44:16,17 45:2,4 46:23 53:14 62:14 63:17 91:11,13,15 103:22 111:11 112:6,13 113:18 114:20 115:8,9 116:7 117:21 119:10 135:22 139:17,19,20 142:9,15 165:8 171:2 179:24 <b>associated</b> 66:23 <b>association</b> 7:10 <b>assume</b> 53:1 75:13 82:23 <b>assumed</b> 83:3 171:20 173:24 174:3,11 <b>assuming</b> 18:9 46:17 57:18 68:23 89:3 126:22 155:10 <b>assumption</b> 26:2 51:22 84:7 100:18 171:11,19,24 172:4 173:25 174:1,18 175:4,10 175:18 <b>assumptions</b> 50:22 83:1 86:1 <b>assurance</b> 149:5 152:25
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<b>assure</b> 127:19	<b>b</b>	43:25 44:22 46:2	120:16 123:18
<b>attached</b> 25:17	<b>b</b> 1:21 11:25	46:4,9,10 47:22	130:2 162:20
179:8	106:7 121:25	47:25 48:11 49:18	172:19
<b>attempting</b>	134:3 136:18	50:14,19 92:2	<b>basing</b> 82:25
106:25	142:3,4,4	<b>bankr</b> 162:20	<b>basis</b> 22:25 23:23
<b>attendant</b> 97:8	<b>b.r.</b> 91:18 92:19	175:14 182:6	24:1 31:16,19
<b>attorneys</b> 3:4,13	92:20 93:18 94:17	183:11	34:23 38:1,21
4:2,9,16 5:2,9,16	100:7,8 102:3	<b>bankrupt</b> 38:24	40:2,16 43:1,14
6:2,15 7:2,10	123:5 162:20	68:5	45:9,10 49:11,24
<b>audit</b> 27:14 33:11	175:14 182:6	<b>bankruptcy</b> 1:1	50:6,7,8,10 51:22
41:16 100:4	183:11,16	1:12,23 28:11	53:21 56:13 61:12
<b>auditors</b> 32:23,24	<b>back</b> 17:20 18:15	65:25 67:22 68:1	64:20 92:15 94:3
33:9,25	32:19 42:18 44:9	68:4,17 91:19,20	96:20 98:14,21
<b>augie</b> 23:24 64:5	47:20,22 48:2,3	91:20 92:19 93:7	99:9,20 100:19
78:15 91:8 92:7	49:12 56:1 57:6	93:18 96:1,6	103:4,6,12 104:4
92:13 98:12 99:19	63:6 71:3,20,22	97:16 98:2 100:11	117:8 133:16
<b>authorities</b>	72:11,13,14,20	104:7 105:13,19	138:18 143:18,19
175:13	82:3 87:21 113:11	118:24 123:22,22	158:25 172:22
<b>authority</b> 185:10	114:2 132:2,23	124:13 136:22,23	173:23 176:16
<b>authorizes</b> 136:22	133:21 134:10	137:7 155:18	185:5
<b>automatic</b> 168:2	138:11 139:5	174:2,18 176:12	<b>bear</b> 58:2
168:16	141:9 143:5	176:20,24 181:24	<b>beauty</b> 6:7
<b>automatically</b>	144:10 164:14	182:5,15 184:22	<b>beefed</b> 124:17
36:16	170:7 174:17	<b>bap</b> 183:16	<b>behalf</b> 10:5 17:23
<b>auxo</b> 6:7	176:8	<b>barbara</b> 8:5	41:12 60:2 67:19
<b>available</b> 15:6	<b>background</b>	<b>bargain</b> 66:25	69:14 70:9 105:24
26:14 40:7 42:9	167:17	<b>bargaining</b> 97:20	129:18 158:21
54:19 81:22,23	<b>baking</b> 91:8	<b>barn</b> 106:10	167:6 170:5
113:21 115:10	<b>balance</b> 16:5	<b>barred</b> 148:3	172:15 186:12
117:6 135:11,19	30:17,19,20,23	<b>barris</b> 9:17	<b>belabor</b> 57:9
135:20 149:11	31:4 35:11 54:9	<b>based</b> 14:2 22:19	106:22 109:10
181:13	63:1 96:9 97:5	23:3 30:4 31:2	<b>believe</b> 36:25
<b>avenue</b> 3:14 4:17	103:23 133:1	35:9 39:13 48:12	49:21 55:20 60:18
6:9,16 7:12	179:21,22	48:15 52:3,17	61:7,9,11 95:14
<b>avoid</b> 54:17 58:14	<b>balances</b> 31:7,12	57:25 60:16 80:6	96:19 99:15 101:4
<b>avoidance</b> 114:10	31:15,18 35:10,15	82:25 96:16	102:15 103:2,10
116:4	39:15 62:24 98:22	103:11,15,25	106:5 107:4
<b>aw</b> 93:8	<b>balancing</b> 37:23	105:20 143:5	109:23 111:7
<b>await</b> 110:20	37:23	178:24 179:6,25	112:1 128:1
<b>awards</b> 70:19	<b>ballot</b> 69:7 101:14	<b>basically</b> 14:7	129:14 133:6
<b>aware</b> 33:19,24	184:17	16:19 21:22 31:25	138:6 147:7,11
51:12	<b>bank</b> 42:16,16,23	52:2 76:8,16	152:4 158:5
	42:23,24 43:15,19	85:13 114:24	160:12 164:12

<p>170:2 172:9 176:14,20 178:24 179:6,16 180:2,19 181:9,13 183:1,13 184:1,12,16 186:3 <b>believes</b> 100:2 <b>ben</b> 9:5 <b>bench</b> 183:20 <b>beneficiary</b> 108:13 <b>benefit</b> 5:9 13:12 41:15 67:19 68:10 87:22 92:12 100:1 103:24,25 108:12 112:24 119:23 140:8,9,10,10 <b>benefited</b> 41:14 <b>benefits</b> 97:7,11 102:17 <b>benefitted</b> 84:12 <b>bernstein</b> 182:6 182:12 183:2 <b>best</b> 39:13 41:10 56:11 95:11 101:16,18 176:21 <b>beth</b> 9:14 <b>better</b> 22:10 47:7 155:2,3 158:13 186:7 <b>beyond</b> 160:17 178:13 <b>big</b> 38:3 108:6,10 <b>bigger</b> 161:23 <b>biggest</b> 106:6 <b>bill</b> 150:10 <b>billed</b> 137:2 <b>billions</b> 37:24 62:9 148:10,10 159:15 <b>bills</b> 41:12 48:22 <b>binding</b> 143:7,7 154:3,6,10 181:25 181:25</p>	<p><b>biswas</b> 7:20 <b>bit</b> 18:14 67:20 107:9,15 108:2 109:19 123:7 153:16 165:17 170:20 <b>black</b> 84:5,6 92:15 <b>bless</b> 82:12 <b>board</b> 12:9 26:23 66:16 94:10 95:21 95:22 103:25 133:15 135:3 142:11,17 186:12 <b>board's</b> 109:8 <b>bold</b> 149:10 <b>bond</b> 115:16 120:15,16,18 145:17 167:19,21 168:13,21,21,22 169:3,5,21 <b>book</b> 41:9 <b>books</b> 33:8 40:12 40:19 41:13 50:8 <b>borne</b> 49:23 51:7 <b>borrower</b> 24:8 <b>borrowers</b> 24:3 42:7 43:15 <b>borrowing</b> 98:23 <b>bothered</b> 27:23 <b>bottom</b> 24:17,21 26:9 36:9 37:15 89:25 <b>bought</b> 56:22 <b>bound</b> 13:16 181:11,11 184:19 184:21 185:7 <b>box</b> 84:5,6 <b>brauner</b> 3:9 <b>breadth</b> 97:18 <b>break</b> 19:25 35:14 43:23</p>	<p><b>breathe</b> 139:8 <b>brian</b> 5:13 67:18 <b>bridge</b> 83:11 <b>brief</b> 19:9 56:15 64:2,9 65:4 75:15 81:11 93:20,21 106:9 143:15 145:9 146:15 156:1 179:1 <b>briefed</b> 167:22 <b>briefly</b> 55:25 167:9 176:2 <b>briefs</b> 99:22 <b>bring</b> 162:4 <b>bringardner</b> 9:19 <b>broad</b> 185:9 <b>broadway</b> 7:4 <b>brought</b> 185:22 <b>brozman</b> 8:18 <b>bryan</b> 8:1 <b>bryant</b> 3:5 8:17 <b>bucket</b> 38:4 <b>budget</b> 157:18,19 <b>budgets</b> 119:17 <b>build</b> 143:16 <b>built</b> 143:16 <b>bullet</b> 32:7 <b>bump</b> 77:17 87:2 90:17 102:11,15 102:20,23 <b>bunch</b> 22:24 38:15 42:17 59:23 <b>burden</b> 64:14 120:14 <b>business</b> 24:18 40:23 84:1,2 100:16 133:1 <b>busy</b> 187:16 <b>button</b> 32:2 <b>buying</b> 25:7</p>	<p><b>c</b> <b>c</b> 3:1,8 10:1 189:1 189:1 <b>calif</b> 183:11 <b>call</b> 32:16,21 63:19 78:7 131:9 166:13 172:7 <b>callback</b> 162:8 <b>called</b> 93:9 95:3 96:25 163:1 179:24 <b>calls</b> 75:4 88:23 <b>canada</b> 150:7 <b>candid</b> 146:19 <b>can't</b> 79:14 83:16 85:24 87:14 120:13 125:22 126:15 131:20 133:3 <b>capable</b> 101:6 <b>capacity</b> 17:23 146:16 <b>capital</b> 4:9 90:21 105:24 <b>capped</b> 13:4,6,13 13:17 <b>care</b> 144:21 171:3 173:22 <b>carefully</b> 176:22 185:9 <b>carl</b> 170:20 <b>carried</b> 59:11 <b>carriers</b> 173:6 <b>carry</b> 183:25 <b>carved</b> 168:10 <b>carveout</b> 10:24 11:4 12:6 15:5 112:23 156:19,23 158:24 159:11 162:23 163:5,9 177:1,3 180:1 <b>carveouts</b> 160:7</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<b>case</b> 1:3 11:11 17:25 18:19 24:7 26:1 29:18 36:24 39:2 53:11,17,17 53:23 54:24 55:7 56:5,9,20 60:5,12 60:14 67:22 74:6 74:21 77:1 78:7 78:18,18 82:8,12 88:18,23 93:3,15 94:14 96:6 98:3,5 99:13,18 100:5 102:9 104:19 105:13 110:17 119:22 123:7 124:6 126:18 132:25 143:11,13 149:15 151:6 158:8 159:15 162:18,19 168:11 176:17 183:6,9,10 183:19,25 187:1 <b>caselaw</b> 77:24 94:15,15 104:1 115:15 <b>cases</b> 19:5 28:11 31:22 37:6 53:5,9 64:16 78:17 93:7 93:13 96:18 99:22 106:7 110:24 112:22 123:9 128:7 158:20 159:16 165:2,2 179:12 186:4 <b>cash</b> 37:2,11,14 39:20,22,23,25 40:2,6,17,22,23 40:24,24 41:3,4 41:11,23 42:3,10 43:14 48:21 62:12 62:13,18,20 63:4 63:10,11 70:12,15 70:17,25,25 71:7	71:9,14,15,19,22 71:24 72:2,3,7,12 72:19 95:25 98:20 100:15 103:11,20 112:14 116:5,9 117:2,3 176:25 177:12 178:1,9 180:23 181:2,4 185:22 <b>categories</b> 13:8 <b>category</b> 13:15 14:10 <b>catherine</b> 7:21 8:24 <b>cats</b> 160:23 <b>caught</b> 149:23 <b>cause</b> 49:25 56:12 56:17 59:2 60:14 61:4 66:13 95:11 95:15 168:18 <b>caused</b> 22:4 <b>causing</b> 96:10 169:21 <b>cavaliere</b> 7:25 170:4,4,12,17 <b>cent</b> 71:21 72:10 72:11,14 77:4,5 179:23 <b>center</b> 5:17 <b>centers</b> 29:15 <b>central</b> 26:24 <b>centralized</b> 26:14 26:24 27:12 37:11 42:3 44:9,13,14 44:22 47:10 48:18 62:13,18 63:17 70:15 71:7 <b>cents</b> 13:4,14,17 54:13,21 145:5 157:25 180:11 <b>certain</b> 20:10 28:4 78:23 97:21 101:12 102:10	104:17 151:15 152:18 184:7,15 185:20 <b>certainly</b> 28:20 60:14 64:6,21 65:4,12 66:4,9,24 67:1,9 108:11 112:8 122:18 132:14 135:25 138:23 157:2 158:18 159:3 160:11 161:2 186:22 <b>certainty</b> 185:25 <b>certified</b> 189:3 <b>cetera</b> 14:15 26:25 27:14 141:18 162:23,24 164:15 <b>challenge</b> 132:21 <b>challenges</b> 52:4,8 <b>challenging</b> 83:10 164:2 <b>chambers</b> 185:18 <b>chance</b> 51:16 54:2 54:6 55:3 64:24 84:22 132:2 143:9 <b>chances</b> 176:21 <b>change</b> 23:6 128:14 169:5,8 187:18 <b>changed</b> 13:2 21:14,16 22:3 27:15 58:18 61:7 61:24 <b>changes</b> 12:21 13:25 14:1,19 16:4 30:23,24 110:11 185:15 <b>changing</b> 160:3 169:17 <b>chapman</b> 185:13	<b>chapter</b> 2:3 65:22 80:23,25 168:4 187:1 <b>charge</b> 88:5 <b>charged</b> 88:15 <b>charges</b> 87:23,25 <b>charging</b> 65:15 73:1,6,18,19,22 73:23 87:12,21 88:3,15,18 105:3 155:6 <b>chart</b> 14:9 102:13 161:14 <b>charts</b> 85:12 <b>chase</b> 47:24,25 48:3,4 <b>chemical</b> 92:2 <b>chest</b> 150:14 <b>chicago</b> 5:11 <b>chico</b> 9:17 172:14 172:15,19,25 173:21 <b>child</b> 175:14 <b>choice</b> 181:15 183:14 <b>choose</b> 60:10 <b>choosing</b> 60:23 <b>cimala</b> 8:1 <b>circuit</b> 78:15 91:7 91:9,23 92:4,7 97:4 99:24 183:16 <b>circular</b> 80:17 <b>circulate</b> 185:17 <b>circulated</b> 170:14 <b>circulating</b> 114:5 <b>circumstance</b> 159:5 <b>circumstances</b> 53:13 59:20 83:13 118:23,25 160:14 182:8 184:2 <b>cite</b> 53:5,10
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[cited - coming]

Page 9

<p><b>cited</b> 64:17 93:16 93:20,24,25 183:17 <b>cites</b> 185:11 <b>citing</b> 93:12 <b>citron</b> 4:15 <b>civil</b> 167:18 168:10 <b>claim</b> 10:18,19 11:17,20 13:5,7 13:14,23,24 18:25 19:1 20:16 25:16 25:17,23,24 36:1 42:23,24 45:7,8 49:5 56:3,4,8,12 56:18 57:4,10,11 57:14 66:14,19 67:4,11 68:13,14 68:15,16,22 69:21 71:21 72:1,5 85:2 86:22 95:13,19,19 95:22,23 96:7,17 103:23 106:7,8 114:13,13,14,16 114:18,19,19,21 115:14 123:7,10 131:21 132:4,5,23 134:11 135:25 136:5,18 137:6 140:19,23 141:17 143:2 144:24,25 146:20 162:15 167:13 173:6 176:15,16 177:7,8 177:9,11,12,13 178:3 179:3,4 <b>claimants</b> 55:9 59:3 109:4 144:1 186:17 <b>claimed</b> 29:16 54:25 <b>claims</b> 10:23 11:23 16:23,25</p>	<p>20:17,17 28:25 29:3 37:1 40:5 42:2,19 43:5 44:7 45:4 46:9 47:10 49:24 50:6 52:18 53:21 54:8,20,23 55:22 56:11 57:14 58:1,2,5,8 59:2 62:4,10 65:6 68:11,13 70:20 71:4 84:16 85:14 85:23 91:15 95:9 100:14,15 102:10 103:6,7,7 104:15 106:3,5 110:1 113:8,19 116:10 117:23 118:2 119:12 121:11,24 121:25,25 122:1 122:16 123:8 128:22 131:14 132:16 143:20 147:12 148:3,15 151:3 152:25 154:14 157:5,25 158:1 159:10,16 160:23 161:16,20 161:23 165:5 172:12 178:12,12 179:1,9,14,21,22 180:8,10,24 186:2 <b>clarification</b> 117:20 126:20 171:9 172:17,20 173:9 <b>clarify</b> 152:7 153:18 154:17 174:2 <b>clarity</b> 130:25 131:2,4 136:14 185:8,25 <b>class</b> 13:1 59:3 80:16,16 94:16</p>	<p>101:16 167:12 184:8 <b>classes</b> 101:11,25 104:13,15 184:6 184:11,11 <b>classification</b> 57:9 176:11,13,14,15 <b>classified</b> 57:12 104:20 <b>classify</b> 104:12 <b>classifying</b> 104:6 176:16 <b>class's</b> 97:11 <b>clause</b> 69:10 <b>clean</b> 14:2 33:22 34:1 133:1 <b>clear</b> 14:8,9,21 15:1 17:21,25 18:7 27:23 62:7 66:5 69:16 77:24 83:5 91:24 95:14 95:25 98:7 99:3 100:2 105:1,7 111:9,15 113:11 113:15 116:20 121:7 124:15 135:6 141:6,22 153:9 169:18 170:1 172:21 173:24 183:4 184:7 185:2 186:9 186:24 <b>cleared</b> 109:15 <b>clearer</b> 14:13 <b>clearly</b> 47:13 58:11 94:12 95:19 100:24 106:17 141:2 176:15 179:10 181:6 183:5 185:1 <b>cleary</b> 5:1 69:14 <b>clichés</b> 69:9</p>	<p><b>client</b> 11:20 88:22 147:9 <b>clients</b> 120:10 144:5 <b>close</b> 158:8 <b>closer</b> 110:1 <b>closing</b> 162:16 <b>code</b> 55:19 96:6 98:3 104:7 110:18 123:22 124:13 131:19 136:22,24 137:7 158:22 174:2 176:12,24 181:24 184:22 <b>collateral</b> 136:17 176:25 <b>colleagues</b> 184:16 <b>collect</b> 37:16 95:21 136:17 <b>collectible</b> 50:10 <b>collecting</b> 72:16 97:9 173:3 <b>collection</b> 159:25 <b>collective</b> 43:25 <b>collectively</b> 63:2 <b>collects</b> 45:15 <b>colloquy</b> 156:18 <b>colon</b> 9:18 <b>combine</b> 162:9 <b>combines</b> 48:11 <b>come</b> 18:13 39:12 40:23 52:1 57:6 84:14,15 110:6 125:23 132:2,23 134:10 <b>comfort</b> 33:16 112:11 180:6 <b>comfortable</b> 57:19 <b>coming</b> 12:6 109:3 112:2 122:13 148:22</p>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[commenced - consequently]

Page 10

<b>commenced</b> 28:11 149:24,24 <b>comment</b> 19:25 149:6 <b>comments</b> 17:20 152:8 <b>committee</b> 3:4 12:7 53:2 56:6 58:16 59:19 61:2 61:5,6 62:2 66:2 70:9 73:17 83:2 95:6 101:1,3 108:1 109:8 128:19,20 152:3 155:15,18 156:16 157:4 179:13 181:1 185:23 186:13,19 <b>committee's</b> 152:4 <b>common</b> 46:21 47:1,3,17 54:22 91:15 103:8 184:24 <b>comp</b> 161:1 <b>companies</b> 28:15 28:18,22 51:1 <b>company</b> 6:3 24:7 26:7,16 27:4,21 28:20,25 29:11 30:1,1,11 31:2 38:1 39:14 45:15 45:16,19 48:10 64:19 91:8,15 92:3 161:22 173:7 <b>company's</b> 32:1 32:17 33:25 45:17 <b>compared</b> 84:23 <b>compensated</b> 75:16 <b>compensation</b> 16:14,17 <b>competency</b> 97:14	<b>competing</b> 72:19 <b>complain</b> 90:13 <b>complained</b> 166:7 <b>complaining</b> 120:6 <b>complains</b> 31:20 126:3 166:6 <b>complaint</b> 108:24 149:14 179:8 <b>complete</b> 12:18 <b>completed</b> 99:15 <b>completely</b> 113:9 151:13 <b>complex</b> 94:21 97:7 99:6 <b>compliance</b> 96:5 <b>complicated</b> 94:18 <b>complies</b> 176:12 <b>comprehensive</b> 103:18 <b>compromise</b> 19:19,21 <b>compromised</b> 53:8 136:19 <b>compromises</b> 19:20 95:9 153:10 <b>compute</b> 120:22 <b>con</b> 65:8,11 66:6 83:11 90:17 94:20 <b>conceivably</b> 150:10,10 <b>concentration</b> 50:15,20 98:21,24 <b>concept</b> 92:23 102:5 <b>conceptually</b> 110:23 <b>concern</b> 55:23 172:25 <b>concerned</b> 30:5 45:20 90:17 108:7 118:21 139:6	146:25 162:21 171:16 176:13 <b>concerns</b> 12:24 <b>concession</b> 159:7 180:6 <b>concluded</b> 29:23 182:12 188:1 <b>conclusion</b> 30:15 30:25 32:23 180:7 <b>condition</b> 67:1 <b>conducted</b> 24:18 34:12,15 <b>conducting</b> 100:3 <b>conduit</b> 70:17 <b>conduits</b> 63:25 <b>confidence</b> 31:6 31:10 99:11 <b>confident</b> 66:20 <b>confirm</b> 10:16 11:11 18:9,17 57:7,18 65:20 81:1,7,17,22 110:22 120:11 131:5 165:2 168:12 178:5 <b>confirmable</b> 58:21 <b>confirmation</b> 2:2 10:7 11:8 14:1 15:13 16:19,20,22 17:4 19:9 50:1 61:16 73:9 81:11 81:18 82:8 93:24 94:1 95:24 103:3 105:6 106:18 107:1 110:6 112:16 113:7 114:16 115:25 120:11 123:12,19 124:10 126:8,13 128:14 130:13,19 132:16,24 134:13 137:14,15 141:21	157:14 166:15 168:23 169:4 174:3,19 175:17 176:10 177:17,23 178:16,22 183:3 184:5 185:5,15,21 185:24 186:7 <b>confirmed</b> 57:23 58:25 107:4 109:20 110:4,10 116:18 129:5 132:15,17 134:21 143:3,6 163:3 167:13 168:4,11 170:11 174:21 175:24 177:6 183:5 <b>confirming</b> 139:1 173:18 <b>confused</b> 24:13 <b>confusing</b> 65:10 <b>confusion</b> 18:1 26:22 105:1 <b>conked</b> 172:7 <b>connection</b> 14:22 59:21 68:12 184:17 <b>consensual</b> 94:3 <b>consent</b> 11:1,7 12:22 13:3,16 66:1,8 80:18 95:4 116:10 153:20 182:9 183:18,21 186:18 <b>consenting</b> 69:4 <b>consents</b> 94:13 <b>consequence</b> 175:17 <b>consequences</b> 121:14,17 <b>consequently</b> 175:17 184:9
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------



<b>conservative</b> 87:4	57:22 58:17,20,23	<b>contingency</b> 136:3	<b>corporate</b> 71:5
<b>considerable</b> 91:22 157:7	59:7 61:11,17	<b>contingent</b> 133:3	99:23
<b>considerably</b> 160:21	63:16 64:25 70:11	<b>continuation</b> 2:1	<b>corporation</b> 1:7
<b>consideration</b> 12:5 74:6	70:14 76:6,21,22	<b>continue</b> 163:24	2:3 10:3 22:23
<b>considerations</b> 92:7	76:23 77:25 78:5	<b>continued</b> 10:6	24:20 67:20 68:11
<b>considered</b> 11:22	78:8,14,19 79:16	76:7 111:15 168:3	176:3
168:13	79:22 83:10,21	<b>continuing</b> 33:6	<b>correct</b> 11:13 15:9
<b>considering</b> 94:6	90:18 91:1,10,23	186:4	20:24 21:8 31:13
<b>considers</b> 97:3	92:6,12,14,16,23	<b>contract</b> 171:9,23	32:14 37:18 38:21
<b>consistent</b> 12:11	92:25 93:4,5,6,8	173:24 174:8,22	38:21 39:7,20,24
15:7 30:16 31:3	93:14,17,21 94:1	182:3,4,16 184:3	40:3,3,13,14,17
93:3 107:11 135:1	94:8,15,20,21	184:23	40:18,20,20,25
138:25 142:19	95:1,3 96:22 98:7	<b>contractors</b> 24:11	41:5,15 48:5 67:7
158:22	99:18,20,25 100:6	<b>contracts</b> 25:3,6	67:14 68:3 69:2,3
<b>consistently</b> 181:22	100:18,20 101:5,9	25:25	69:6,11,22 72:18
<b>consolidate</b> 19:2	101:21 102:4,6,8	<b>contrary</b> 64:14	75:8 115:2 125:16
62:15 80:4	103:1,8 104:2	104:9 114:11	129:9 134:22
<b>consolidated</b> 20:13,20 23:23	106:13 107:13	115:15 117:7	137:13 143:8
24:6 26:25 27:3,4	<b>constituents</b> 186:13	<b>contrast</b> 54:5	146:6,13 156:9
32:23 33:14,15,16	<b>constitute</b> 107:2	<b>contributed</b> 10:24	167:8 169:6,10
33:23 38:1 43:20	182:21	163:7	171:19 172:2,5
45:10 53:21 62:14	<b>construct</b> 74:11	<b>contributing</b> 98:23	175:3,5 176:5
62:24 63:21 64:20	183:5	<b>contribution</b> 186:20	185:24
81:23 87:7 91:6	<b>construed</b> 173:7	<b>control</b> 28:3 56:17	<b>corrected</b> 29:21
91:14 95:9 98:10	<b>consumed</b> 117:3	<b>controlling</b> 120:4	30:2,13 59:13
98:22	<b>contained</b> 114:11	<b>controls</b> 117:13	<b>correction</b> 30:7,8
<b>consolidating</b> 19:8 91:11	<b>contains</b> 83:9 95:2	<b>controversial</b> 118:17,18	<b>corrections</b> 30:3
<b>consolidation</b> 19:5,7,11,14	126:9 138:1	<b>conundrum</b> 71:6	<b>correctly</b> 32:17
21:11,15 22:6,18	<b>contemplate</b> 94:25	<b>conveyance</b> 71:20	<b>cost</b> 51:3,7,9,11
23:6,10,11,14,16	<b>contemplated</b> 100:11 135:13	<b>conveyances</b> 64:1	51:14 78:19,21
24:1 25:13 27:17	139:2	<b>convicted</b> 53:25	79:8 88:20 100:3
44:17 45:4 46:22	<b>contemplates</b> 81:8	<b>coordinating</b> 12:13	103:14
51:17 52:12,15,18	95:2	<b>coordination</b> 12:18	<b>costly</b> 50:1
52:21 53:6,19	<b>contested</b> 99:18	<b>copies</b> 17:1	<b>costs</b> 49:22 74:5,9
54:3,7 55:8 57:6	<b>context</b> 45:4 65:4	<b>copy</b> 14:4	79:17 82:17
	93:8,14 94:7	<b>corp</b> 5:9 26:12	100:21 149:20
	97:23 98:6 100:4	123:5 162:19	150:13 151:1,2
	100:9 141:22		155:11,12,14
	160:5,6 163:20		186:4
	164:7,9 183:3		<b>couldn't</b> 136:5
			<b>counsel</b> 20:15,22
			80:15 96:23 97:15
			110:7 114:4 166:1

168:18 172:13 175:16,25 179:14 180:25 <b>counsel's</b> 79:21 <b>counterparty</b> 171:14 <b>counting</b> 49:5 <b>country</b> 189:21 <b>couple</b> 14:19 17:19 25:16 110:8 114:2 123:16 165:19 166:1,4 <b>course</b> 13:21 36:15 54:11 77:17 91:13 99:12 101:21 110:18,19 112:21 136:15 154:13 155:7 157:20 172:23 187:2 <b>court</b> 1:1,12 4:3 10:2,8,11 11:5,14 11:17 12:10,19,24 14:16,25 15:7,10 15:14,22,25 16:2 16:5,8,12,14 17:5 17:7,16 18:13,18 29:5,7,10,14 42:10,19,22 43:1 43:4,8,11,17,19 43:22 44:3,12,14 44:16,20,23,25 45:2,19,23 46:1,4 46:7,11,13,19 47:1,3,11,21,24 48:2,6,10,13,23 49:1,4 54:11,14 55:12,15 61:15 63:9 65:16,25 66:11,12 67:2,5 67:12,15,17 68:1 68:7 69:1,3,9,12 69:19,23,25 70:5	70:7 71:13 72:6 72:16,22,25 73:7 73:13,16 74:16,19 74:25 75:2,4,7,9 75:12,19,22,24 76:1,11,13,15,19 77:10,12,15,23 78:2,9,16,25 79:2 79:6,8,11,13,13 79:19 80:10,17,21 81:2,6,14,17 82:2 82:7,14,16,21,23 83:20,23 84:5,11 84:17,20,24 85:4 85:6,10,12,19 86:2,10,15,17,23 87:13,15,18,20,25 88:2,7,11,21 89:1 89:7,9,12,16,18 89:20 90:2,5,8,10 90:13,22,25 91:3 91:22 94:8 97:3 97:16,25 100:2,5 100:19 102:5 106:1,11,16,19,21 107:17,22 108:6 108:14,16,20,22 109:2,12 111:12 111:14,20,25 112:4,7 113:23 114:16,23 115:3,7 115:11,22 116:1 116:12,24 117:5,7 117:12,24 118:5,8 118:12,14,18 119:2,5,8,11,13 119:20,25 120:2 120:22 121:2,5,7 121:18,20,22 122:4,7,10,15,18 122:20,23 123:1 123:15 124:3,5,11 124:15,20,24	125:3,5,8,10,13 125:15,19,22 126:2,15,21 127:4 127:6,9,11,14,17 127:21,24 128:10 128:12,15,17 129:1,3,5,8,10,16 129:19 130:12,15 130:19,24 131:3,7 132:14 133:2,5,10 133:18,21,25 134:5,9,12,17,20 134:24 135:8,13 135:17 136:7,10 136:12,25 137:10 137:14,18,22 138:3,10,13,21 139:7,13 140:2,6 140:12,17,21,25 141:11,15 142:2 143:1,18,24 144:2 144:8,14,19,22 145:3,7,8,15,20 145:25 146:3,5,7 146:10,12,14,17 146:21,24 147:3 147:10,14,15 148:1,4,18,22 149:1,4,8,21,22 151:6,8,11,14,19 151:22 152:1,6,9 152:14,17,24 153:4,6,22 154:3 154:8,14,25 155:4 155:10,14,17,22 156:6,10,13,17,25 157:10 158:2,12 158:17 159:20,24 160:5,12 161:3,4 161:5,6,9,11 162:12 163:6,9,12 163:16,19,22 164:1,4,6,9,12,18	164:21,25 165:17 165:21 166:12 167:7,10,11,22 168:2,12,21 169:2 169:7,13,16,23,25 170:8,16,19,25 171:5,15,22 172:1 172:3,6,16,21 173:10,14,16,20 173:22 174:5,8,12 174:16,21 175:1,3 175:6,9,13,21 176:5 178:5 186:24 187:6,10 187:12,15,24 <b>court's</b> 55:6 66:7 <b>courtney</b> 8:6 <b>courts</b> 92:5,16 <b>court's</b> 91:6 <b>cover</b> 75:12 155:22 167:19 <b>coverage</b> 151:16 151:24 152:19 <b>covered</b> 119:6 129:15 151:3,3 <b>cramdown</b> 184:6 184:10 <b>create</b> 135:4,21 135:21 <b>created</b> 111:3 119:18 128:19 130:5 143:15 <b>creates</b> 71:6 <b>creating</b> 71:4 72:5 <b>creations</b> 6:8 169:25 170:5 <b>credible</b> 103:15 178:18 <b>credibly</b> 99:10 <b>credit</b> 40:1 84:10 92:11 159:3 <b>creditor</b> 25:2 64:4 64:6 66:9 69:1,17
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[creditor - debtors]

Page 13

69:25 92:9 94:13 94:23 95:18 101:2 101:20 106:6 110:20 112:13 113:19 119:12 120:5 129:23 135:10 157:21 159:2,9 181:10 <b>creditors</b> 3:4 12:7 12:24,25 13:9 23:23 24:5,11,18 26:22 27:18 28:5 38:16,23 44:10 47:14 49:25 50:2 53:2,10,18 54:20 54:22 55:11 56:5 57:24 58:16 59:19 61:2,5 62:2 66:2 68:9 72:15 90:11 90:15 91:25 92:13 92:17,24 96:4 97:10,12 98:14,17 100:1,10,25 101:11,17,22,24 102:17,21,24 104:13 108:12 111:11 112:12 113:4,15,19,21 115:10 117:6,22 118:1,2 119:22 131:12,12 137:4 140:5,9,10 148:6 156:12 158:13 162:21 176:21,23 179:13 180:11 181:1,9 182:8 184:18 186:1 <b>creditors'</b> 83:2 95:6 101:1,3 112:18 <b>credits</b> 30:6 <b>crescent</b> 4:3	<b>crimes</b> 53:25 <b>critical</b> 92:8 <b>criticize</b> 181:10 <b>cross</b> 178:18 <b>current</b> 31:10 95:25 103:11 147:16 150:21 <b>currently</b> 56:2 95:17 137:12 159:21 <b>customary</b> 105:12 <b>cut</b> 135:20 138:11 144:10 <b>cutler</b> 5:15 145:22 <b>cutoff</b> 170:6 <b>cyrus</b> 4:9 14:20 15:15 90:21 105:22,24 106:3,5 114:9 129:5 <b>d</b> <b>d</b> 1:22 5:21 10:1 <b>d&amp;o</b> 149:9 150:17 <b>d&amp;os</b> 149:23,23 <b>daily</b> 98:21 <b>dallas</b> 4:4 <b>damages</b> 30:20,23 <b>damper</b> 156:7 <b>dan</b> 8:12 <b>date</b> 13:24,24 15:18,19,24 16:20 16:24 67:1 82:5 110:14,21,23 111:1 112:16 113:6 115:18 116:7,13,19,23 117:18,20 118:19 118:20 119:2,6 120:9 121:6,25 122:13 123:13,19 124:19 125:1 126:13 128:3 130:15 139:23 140:16 141:16	153:12,13,18,24 154:2,9,9 157:5 157:20 162:16 163:23 164:19 169:4 174:3,19 177:10,24,25 179:20 189:25 <b>david</b> 4:20 <b>davidoff</b> 4:15 <b>day</b> 12:16 17:18 40:23 76:6 79:7 124:21 125:17 138:1 143:8 150:13,14 185:17 <b>days</b> 13:11 15:16 15:21 22:10 125:7 125:15 165:20 181:15 186:8 <b>days'</b> 124:21 126:5 <b>de</b> 74:8 131:20 173:25 174:1,17 175:10 <b>deadline</b> 157:10 <b>deal</b> 27:8 57:18 61:17 65:16 66:6 79:19 106:12 120:13 122:13 128:20,20 166:20 169:15 <b>dealing</b> 25:21 26:23 27:19 40:22 78:22 84:4,6,7 109:18 116:12 137:16 148:6 160:22 <b>deals</b> 137:18 <b>dealt</b> 23:23 24:6 28:5 91:25 92:9 93:1 94:4 98:14 100:10,10 106:13 148:8 151:23 160:6 166:17	182:5 <b>deathtrap</b> 88:12 <b>debit</b> 30:6 <b>debt</b> 20:16,17 26:13 90:6,9 162:23 <b>debtor</b> 1:9 19:17 19:19 20:20 22:16 24:25 25:7 26:2 28:7 31:1 34:22 35:16 36:17 37:4 37:5 39:18,19,19 41:14 42:12,12 43:23,24,24 49:24 49:24 50:6,6,7,7 50:10,10,10,11,11 50:14 55:2 57:25 61:6 62:25 63:2 66:3 73:17 78:23 80:16 82:10 83:3 88:9 92:1 95:11 96:25,25 98:18 99:9,9 100:14,14 103:3,3,6,6,9,9,12 103:12 104:17 105:18 110:11,11 110:12 120:17 128:18,18 130:3 148:6,7 149:13 150:14 171:23 173:8 177:19,19 178:4,6,7 <b>debtors</b> 2:4 3:13 4:2 10:5 18:16,19 18:24 19:2,3,4,6,8 19:15 20:4,10,13 21:10,14 22:1,5 22:25 23:8,9,23 24:19 25:10 26:6 26:13 27:7,16,25 28:15 31:2,13,16 31:18,21 32:22 34:23,24,24,24
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

36:5,12,21 37:2,6 38:4,19,20 39:3,6 39:9,14,23,25 40:12,15,21 41:2 41:11,13,20,21,21 42:1,5,8 43:20 45:22 47:4 48:7 49:7,18,21 50:18 50:25 51:3 52:20 53:1,5,10 54:5,25 56:15 57:5 58:2,3 58:17 59:13,18 60:8,10 61:5,18 61:20,24 62:13 65:20 67:22 68:19 68:22 76:23 78:6 79:13 80:23 83:6 83:16 84:1,2 87:4 91:5,11,14,16 92:12 94:22,25 95:12,13 96:10,13 96:18 98:10,13,19 98:23,25 99:1,25 100:11,24,25 101:1,7,7,12 102:22 103:3 104:10 105:9,11 105:11 106:5,25 108:23 109:15 110:15,15,23 111:4 114:4 118:17 123:17,20 123:20,23 124:7,7 128:2,4 139:19,21 140:14 147:5,7 148:8,16 153:9 160:13 166:1,14 168:12,24 172:21 173:13,14 175:24 178:5,13 179:1,8 179:12 180:23 183:22 184:7 185:3,11,23 186:9	186:12,19 <b>debtors'</b> 81:11 83:1 93:20,25 95:25 96:9 101:2 102:13 103:11,19 103:23 105:3,7,21 109:22 110:7 113:12 <b>december</b> 28:10 <b>decide</b> 105:19 141:9 149:17 <b>decided</b> 21:10 28:6 59:6 135:9 <b>decimated</b> 58:8 <b>decision</b> 21:12,23 23:6 94:5 154:19 182:14 <b>decisions</b> 54:19 93:20 <b>declaration</b> 22:9 23:12,22 24:15 26:7,19 28:14 31:20,23 62:17 64:3 65:12 99:3 102:14 178:16 179:7 <b>declarations</b> 14:14 18:20 101:14 178:15 <b>deconsolidated</b> 52:4 86:2 102:21 <b>deconsolidation</b> 22:21 <b>deduction</b> 10:18 <b>deem</b> 171:10 <b>deemed</b> 104:16 171:16 175:4,18 181:21 182:9,19 183:18,21 <b>defendant</b> 146:5 167:25 <b>defendants</b> 147:17 150:16	179:9 <b>defense</b> 149:20 150:13 151:1,2 <b>defenses</b> 12:15 <b>deferred</b> 160:1 <b>deficit</b> 38:20 <b>defined</b> 114:14 115:9 126:23 <b>definitely</b> 68:17 <b>definition</b> 19:21 126:4 <b>definitions</b> 141:6 <b>degree</b> 97:11 <b>delay</b> 97:9 100:22 179:20 <b>delayed</b> 160:22 <b>delays</b> 50:1 <b>delivered</b> 156:17 <b>denied</b> 123:9 <b>deny</b> 104:3 168:7 <b>depends</b> 45:7 77:8 134:1 135:19 143:3 <b>deplete</b> 49:25 <b>deposition</b> 20:2,7 24:5,14 34:8 51:20 65:9 76:4 <b>derivative</b> 68:15 <b>describe</b> 138:23 <b>described</b> 138:22 <b>description</b> 26:17 70:12 151:15 <b>desegregated</b> 162:24 <b>designated</b> 20:2,7 <b>designees</b> 16:21 113:2 <b>desire</b> 95:21 <b>despite</b> 23:5 79:21 <b>detail</b> 25:11 34:19 39:17 41:8 <b>detailed</b> 20:15 62:16	<b>determination</b> 18:16 53:14 97:25 134:2 <b>determinations</b> 61:4 <b>determine</b> 23:25 30:22 43:12 48:14 49:16 70:18,19 83:16 98:25 <b>determined</b> 24:12 142:10,16 157:15 182:7 <b>determines</b> 163:4 <b>determining</b> 79:24 92:5 <b>didn't</b> 80:3 84:11 106:12 108:20 125:11 <b>died</b> 166:10,14 <b>difference</b> 50:24 52:23 57:15 58:7 77:16,21 <b>different</b> 25:23,24 25:24,25 26:1 39:22 45:14 59:17 72:9 77:12 78:23 114:2,23 115:17 120:12 122:14,16 123:7,9 146:16 149:25 150:16 152:10 154:19 177:8 178:3 183:13,23 <b>differently</b> 104:23 154:22 155:3 <b>difficult</b> 51:4 74:11 <b>difficulties</b> 29:4 49:22 <b>difficulty</b> 29:17 38:2 97:9 <b>dip</b> 142:21 158:4 160:8 164:3
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[dip - draft]

Page 15

176:25 <b>direct</b> 100:20 <b>direction</b> 113:2 <b>directions</b> 107:10 <b>directly</b> 88:16 171:14 173:5 <b>director</b> 66:17 95:16 <b>directors</b> 27:10 66:16 67:12 97:19 141:8 149:11 <b>disadvantageous</b> 72:15 <b>disagree</b> 143:12 147:17 <b>disagreed</b> 183:12 <b>disallowing</b> 106:8 114:16 <b>disappear</b> 169:21 <b>disbursing</b> 74:7 <b>discharge</b> 131:20 131:21 133:8 136:23 137:1,3 <b>disclaimed</b> 152:19 <b>disclaiming</b> 151:15,24 <b>disclosed</b> 139:24 <b>disclosure</b> 20:4,9 31:21 36:4,11 49:21 56:6 59:22 60:7 74:23 85:11 138:4,4,17,22,24 139:9,16 142:19 146:2 147:1,2,22 149:17 151:7,10 151:18,21 159:14 181:15,23 182:13 184:17 <b>discount</b> 86:4 144:25 181:3 <b>discretion</b> 55:6 58:23 91:22 105:10 133:15	141:8 142:10,16 <b>discuss</b> 20:8 <b>discussed</b> 180:2 <b>discussing</b> 110:7 <b>discussion</b> 14:16 107:1 170:24 <b>discussions</b> 21:23 22:11 31:9 52:8 53:3 66:7 68:21 <b>disentangle</b> 49:23 50:5 51:4,8 <b>disentangling</b> 99:23 <b>disjunctive</b> 92:9 <b>dismissal</b> 172:12 <b>disposed</b> 186:6 <b>disposition</b> 56:10 <b>dispute</b> 19:16,22 20:3,21,23 21:6 59:8 69:18 77:9 77:22 98:8 174:10 <b>disputed</b> 106:7,7 114:13 121:24,25 122:1 123:8,10 <b>disputes</b> 12:1 20:12,14,15,19 21:1,2 68:17,19 77:6 149:22 152:24 <b>disregarded</b> 91:17 <b>disserve</b> 162:2 <b>disservice</b> 17:9 <b>distilled</b> 92:7 <b>distinction</b> 135:17 135:18 <b>distractions</b> 73:3 <b>distributed</b> 143:20,21 <b>distributing</b> 141:7 <b>distribution</b> 10:25 10:25 11:2 13:13 13:19,19 15:10,22	15:23 73:19,20,21 87:12,17,22,23 88:5,19 125:8 126:5 141:3,9 <b>distributions</b> 15:20 50:2 60:2 63:13 73:8,14 74:1,4,8,10,12,22 105:14 110:20 112:13 113:20 115:10 125:4 <b>district</b> 1:2 <b>diversion</b> 107:25 <b>diverted</b> 107:10 <b>divide</b> 115:11 <b>divided</b> 53:14 <b>dixie</b> 55:15 78:18 93:18 94:17 100:7 102:2 <b>docket</b> 19:12 25:16 156:24 173:17 <b>document</b> 89:11 141:25 147:13 <b>documentation</b> 18:21 <b>documents</b> 16:9 28:1 112:11 126:10,11,12,23 126:24 138:24 157:17 <b>doesn't</b> 84:21,22 84:24 89:16 107:2 108:11 110:25 111:18 114:25 115:3 120:7,20,22 129:22 130:6,8,12 131:25 135:21,21 <b>dogs</b> 160:23 <b>doing</b> 58:3 62:4 82:17 86:17 107:2 112:20 113:1 181:5	<b>dollar</b> 38:5,6,7,10 38:13,14,15,15 54:21 55:13,17 70:18,19,24 71:1 71:24 72:10 77:6 85:22 87:2 88:16 101:13 103:14 179:23 180:11 <b>dollars</b> 71:21 72:11,14 77:4,5,9 77:18 148:11 152:9 159:15 <b>don't</b> 78:4 79:20 80:12,22 81:13,19 82:13 83:17,18 86:5,12,22 87:21 88:11,21,23,24 89:4 90:18 91:2 97:22 103:7 107:4 107:21 108:17,19 109:23 111:1,7 112:10 113:13,25 117:8 118:22 119:4,20 120:5 122:5 123:25 124:11 125:19 126:25 127:2 129:11 130:14,16 131:24 132:7,11 132:12,20,20,22 133:6,13 134:7,17 134:20 135:1,10 135:12 136:12 <b>door</b> 145:22 <b>dorr</b> 5:15 <b>doubt</b> 64:4 65:7 114:10 116:4 139:7,7 <b>doubted</b> 17:12 <b>dough</b> 79:3 <b>doughnuts</b> 152:9 <b>draft</b> 113:12 128:1 185:16
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[drafted - entitlement]

Page 16

<p><b>drafted</b> 59:10 132:22 173:2 185:1 <b>drain</b> 1:22 166:12 166:13 <b>dramatically</b> 179:5 <b>drawing</b> 150:8 <b>dream</b> 135:11 <b>drive</b> 5:10 <b>dropped</b> 81:12 <b>dte</b> 73:11 <b>dublin</b> 3:8 70:8,9 71:17 72:9,18,23 73:2,10,14,24 74:18,24 75:1,3,5 75:8,10,18,20,23 87:11 126:4,7 152:2,2,7,11 <b>due</b> 30:10,10 31:1 31:1,12,12,15,15 31:17,18 34:22,22 35:15,15 36:14,15 50:22,23 62:19,21 63:18,23 135:24 137:23 143:11 187:2 <b>dustin</b> 7:24 <b>duties</b> 88:14 110:17 <b>duty</b> 182:20 183:3</p>	<p><b>easy</b> 32:11 145:9 145:11 164:22 <b>economic</b> 92:10 <b>ecro</b> 1:25 <b>edgewell</b> 173:22 <b>edgewell's</b> 175:16 <b>edward</b> 7:15 153:8 <b>ef</b> 37:4 <b>effect</b> 22:15 55:23 58:3,12 59:11 76:22 83:9 91:10 98:25 114:5 119:16 127:1 130:13 150:6 161:1 168:6,7,17 169:18,19 <b>effecting</b> 154:3 <b>effective</b> 13:23 15:18,19,24 16:24 67:1 68:24 82:5 109:20 110:4,10 110:14,20,23 111:1,1 112:16 113:6,17 115:1,18 116:6,13,19,23 117:18,20 118:19 118:20 119:2,6 120:8 121:6,10,18 121:20,25 122:13 123:13,19 124:9 124:19 125:1 128:3 130:15,20 130:21 131:7,8,9 134:2,6 139:22 140:16 141:16 143:4,7 153:10,11 153:13,18,23,24 154:1,2,8,9,9 161:22 162:25 163:23 164:19 169:4 174:22 177:10,24,25</p>	<p>178:8,21 179:20 180:9 186:10,25 <b>effectively</b> 37:11 40:4 57:14 61:24 76:17 83:6,25 133:8 137:2 159:12 168:7 <b>effects</b> 93:1 107:14 184:24 <b>effort</b> 34:18 35:13 35:19 37:23 103:16 182:13 <b>efforts</b> 56:11 95:11 <b>eighth</b> 7:12 <b>either</b> 20:5 21:12 30:8 37:3,10,16 56:15 61:12,12 63:1,18 75:16 77:7 82:4 83:18 97:12 104:21 122:12 141:20 148:19 155:7 165:9 166:4,18 174:16 181:11 182:10 183:23 <b>elements</b> 83:9 <b>elicited</b> 18:17 <b>eliminated</b> 91:16 93:1 102:25 <b>else's</b> 77:11 <b>emboldened</b> 148:23 <b>emerge</b> 96:1 <b>emergent</b> 160:21 <b>emily</b> 8:8 <b>enable</b> 96:2 <b>endear</b> 158:14 <b>endorsing</b> 149:2 <b>enforcing</b> 100:13 <b>enhancement</b> 52:25 53:3 54:7 85:1,21,22 86:21</p>	<p>86:25 <b>enormous</b> 49:22 51:7,8,14 <b>enron</b> 53:17,17 54:12 84:23 93:24 <b>ensure</b> 94:9 164:18 <b>entangled</b> 54:25 92:12 99:25 <b>entanglement</b> 28:9 64:5 <b>enter</b> 16:19 19:20 28:6 <b>entered</b> 16:22 24:25 29:23 67:23 80:1 187:13 <b>entering</b> 187:17 <b>enterprises</b> 183:10 <b>entire</b> 58:13 <b>entirely</b> 53:11 104:11 118:20 148:15 185:24 <b>entities</b> 25:21,22 25:24 26:1,14,22 27:10,25 28:2,7 32:12 36:13 41:3 42:7 44:7,8 45:3,5 47:14 49:9 55:2 58:5 63:3 64:18 64:23 71:10,14 72:18 78:11,23 81:3,6,25 84:8 92:9 98:18 99:5 104:17 146:9 184:5 <b>entitle</b> 122:3 <b>entitled</b> 46:25 56:8 72:21 74:7 87:16 131:20 143:12 <b>entitlement</b> 135:4</p>
<p><b>e</b></p>			
<p><b>e</b> 1:21,21 3:1,1 6:12 10:1,1 65:24 92:3,3 189:1 <b>e.d.</b> 183:11 <b>ear</b> 112:9 <b>earlier</b> 14:3 111:3 114:3 133:22 <b>early</b> 27:8 64:22 <b>earmarked</b> 111:6 <b>easily</b> 98:24</p>			

<b>entity</b> 22:23 25:18 25:23 28:5 29:8 31:1 37:5 43:9,13 43:13 45:5,9,11 45:13,20,22 46:7 46:7,8,9,13,13,14 46:15 47:8,8,15 47:15,17 50:11 53:19,25 54:1 57:25 58:1 63:23 68:6,14 70:17,23 71:9,16,19,25 72:3,4,10,12,19 81:3,4,10,10,19 91:13 96:11 <b>entries</b> 29:20,21 31:3 36:16 41:9 <b>entry</b> 178:22 <b>enumerates</b> 23:10 <b>environment</b> 120:12 <b>equal</b> 33:4 177:12 <b>equally</b> 82:9 <b>equitable</b> 57:10 91:6 92:14,17 98:4 102:5 138:19 138:20 <b>equity</b> 55:6 184:11 <b>errors</b> 30:12 <b>esl</b> 5:16 14:20 18:1 85:14 114:9 117:9 129:18 136:15,16 144:10 144:15 145:22 146:5,8 148:15 150:15 152:23 165:9 179:24 <b>esl's</b> 114:4 <b>especially</b> 80:14 <b>essence</b> 83:21 98:22 120:17 180:14	<b>essentially</b> 68:9 68:15 108:1 110:17,25 129:22 <b>established</b> 52:3 180:5 <b>establishing</b> 53:7 <b>estate</b> 10:22,25 14:14 15:3 27:13 63:14 75:21 78:22 88:6 105:21 109:4 111:11,15,16,19 112:20 113:13,16 113:16 115:19 116:21 117:19 118:21 119:10 120:7 121:8 130:9 131:10 162:22 185:23 <b>estates</b> 7:2 19:3 27:11 49:23 63:6 66:9 102:10 105:3 105:7 107:5 109:7 112:14 116:6 123:23 <b>estate's</b> 103:22 <b>estimate</b> 103:14 139:21 140:14 <b>estimates</b> 67:5 165:11 <b>et</b> 10:3 14:15 26:24 27:14 141:18 162:23,24 164:15 <b>evaluated</b> 55:16 <b>evaluating</b> 97:3 <b>event</b> 17:13 65:24 114:12 123:14 <b>events</b> 96:1 <b>eventual</b> 68:12 <b>eventually</b> 68:19 79:4,6 <b>evergreen</b> 133:16 138:16,18 139:1,6	139:12 142:12 <b>everybody</b> 13:11 27:23 63:17 65:21 84:1,3 137:8 187:7 <b>everybody's</b> 12:8 141:14 <b>everybody's</b> 83:19 <b>evidence</b> 18:20 26:3 64:14 148:9 149:2 177:16 <b>evolving</b> 22:12 <b>exactly</b> 14:17 15:12 16:15 39:10 43:2 45:22 48:16 73:10 83:25 87:17 136:11,13 145:19 151:10 171:1 174:15 <b>examination</b> 178:18 <b>example</b> 38:12,14 70:24 74:23 155:25 178:23 <b>excel</b> 150:1,23 <b>exception</b> 153:19 154:12 178:2 180:1 <b>exceptions</b> 182:17 182:19 <b>excess</b> 10:20 11:21 152:20 <b>excessive</b> 83:12 <b>exchange</b> 20:11 <b>exchanged</b> 171:3 <b>excuse</b> 11:6 79:22 139:15 150:22 <b>execute</b> 73:5 <b>executing</b> 52:4 <b>executory</b> 174:7,8 174:23 175:19,22	<b>exercise</b> 80:20 87:11 <b>exercising</b> 55:6 <b>exhausted</b> 150:2 <b>exhibit</b> 24:15 25:20 26:9 31:8 <b>exhibits</b> 18:21 <b>exist</b> 52:9 71:7 <b>existence</b> 115:1 126:13 <b>existent</b> 59:7 <b>existential</b> 17:12 <b>existing</b> 128:9 <b>exists</b> 18:12 98:1 132:24 162:4 <b>expand</b> 70:10 <b>expansive</b> 35:8 <b>expect</b> 33:8 86:24 164:15 <b>expected</b> 51:11 86:24 <b>expended</b> 113:22 <b>expense</b> 10:19 11:21 12:25 13:5 13:7,9,16 66:14 68:16 82:6 94:10 95:13 96:4,7,8 97:8 100:13 111:2 116:10 117:16 153:20 159:2,9 180:11,24 181:8,9 182:8 <b>expenses</b> 74:5,20 83:8 96:3,5 104:25 105:5,8 155:6 178:1,11 179:2 186:1 <b>expensive</b> 98:9 99:6,12 103:10,13 103:19 <b>experience</b> 26:18 52:3,11,14 97:15 97:15
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<b>experienced</b> 101:6	41:13 42:2,4 45:22 49:17 51:18	<b>faith</b> 96:19 101:6 104:8 157:7	<b>fiduciaries</b> 100:24
<b>experiencing</b> 119:16	55:5 57:13 58:24 61:12 62:1 66:20	176:19	<b>field</b> 75:4 88:23
<b>expert</b> 41:5 51:18	67:9 76:20 78:11	<b>far</b> 22:2,3,12 30:4 30:10 33:17 42:19	<b>fifth</b> 3:14
<b>expertise</b> 41:25	80:1,3,14 83:17	45:19 50:4 58:14	<b>fight</b> 54:12,17 77:5,18 170:20
<b>explanation</b> 30:6 56:9 146:2	83:19,20 87:1 94:18 96:21	64:20 83:12 90:16 103:13 108:6	186:7,8
<b>explicit</b> 104:19	104:13 109:6	111:18 118:20	<b>fighting</b> 54:15 151:4
<b>exposure</b> 12:4,17	119:10 143:15	162:21 171:15	<b>figure</b> 41:20 73:10
<b>expressed</b> 58:16	144:3 156:15	176:11,13	<b>figured</b> 27:8
<b>extend</b> 84:10 113:12	157:18 162:1 165:4 169:8 185:8	<b>farnan</b> 123:4	<b>figuring</b> 74:11
<b>extending</b> 92:11 159:2	<b>facto</b> 131:20 173:25 174:1,17	<b>fashion</b> 6:5	<b>file</b> 13:25 14:3 16:13,17,25 17:3
<b>extensive</b> 93:22 156:19	175:10	<b>favor</b> 55:13 58:19 80:15 94:20	21:11,14 27:2,4 126:13 137:12
<b>extent</b> 37:9 40:21 44:10 49:8 55:19	<b>factor</b> 14:16 102:2	104:16,16 156:1 183:20	139:9 165:16
97:19 117:2	<b>factors</b> 23:11,13 23:16 26:21 52:2	<b>avored</b> 59:8	<b>filed</b> 10:14 17:2 19:4,6,17 21:16
128:24 157:8,14	78:14 92:5 93:10	<b>feasibility</b> 67:5 96:9 103:5 161:14	22:18 25:23 27:1 27:16,21 39:3,9
169:1 174:23	93:10 97:22,22	161:24 163:1,20	39:13 76:6 89:11
175:19 177:7	98:6 100:21 147:4 181:16	164:7 184:1	129:20,24 137:25
<b>extra</b> 17:1 126:7	<b>factory</b> 6:3	<b>feasible</b> 160:10	138:24 141:25
<b>extraordinary</b> 110:20	<b>facts</b> 18:16 23:17 64:7 65:1,1,3,8	<b>feature</b> 139:1	146:20 147:24
<b>extrapolate</b> 76:17	96:25 103:11	<b>february</b> 18:23 27:9 61:25 80:2	156:1,16 165:19
<b>extremely</b> 103:19	107:20 123:6	156:22 157:18,19	167:15 168:1
<b>eye</b> 186:6	149:16 183:13	<b>fee</b> 112:21 128:9 128:10,11 156:19	177:17
<b>f</b>	<b>fail</b> 168:15,15,24 169:6,10,14,24	161:2 162:7 164:14	<b>files</b> 28:1
<b>f</b> 1:21 26:9 189:1	<b>failed</b> 16:11,15	<b>feel</b> 105:17 141:12 159:9	<b>filing</b> 20:8 27:9 36:1 68:4,17
<b>f.2d.</b> 91:8 92:3,13	<b>fair</b> 12:2 21:5,18 21:19 22:2,2,23	<b>fees</b> 59:16,20,21 60:4,4,9,22 66:22	120:25
<b>f.3d.</b> 93:12	38:17 57:10 78:2 92:18 98:3 151:11	72:24 74:3,20	<b>final</b> 21:23 96:16 122:2,9 161:2
<b>fabricators</b> 56:5	152:17 153:1	87:10 88:4 104:25	163:18
<b>face</b> 21:1 159:4	163:14 176:23	105:4,8,20 154:18	<b>finally</b> 11:22 13:20 30:22 53:1
<b>faced</b> 75:21	<b>fairest</b> 84:2	155:6 160:9	59:13 104:22
<b>facilitate</b> 74:1	<b>fairly</b> 59:3 98:20 123:18 133:19	186:18	<b>financial</b> 21:3 26:25 27:4,12,21
<b>facilitating</b> 73:21 74:22 105:13	<b>fairness</b> 159:2	<b>feld</b> 3:3	29:4,17 32:23
<b>fact</b> 18:11,11 23:5 25:16 26:3 27:22		<b>ferry</b> 93:10,13 97:5	33:15,16,23 69:9 177:18
29:17 32:15,20			
36:6,21,22 38:20			



<b>financials</b> 29:19	<b>flipped</b> 120:17	<b>formally</b> 166:24	83:22,24 84:10,15
<b>financing</b> 26:6,11	<b>flipping</b> 115:15	185:16	84:19,21 85:1,5,8
<b>find</b> 22:18 30:12	<b>flipside</b> 45:14	<b>former</b> 183:2	85:11,17,20 86:9
36:23 56:14 104:9	<b>float</b> 39:23	<b>forms</b> 35:16	86:12,16,19 87:8
136:2,3 163:20	<b>floor</b> 6:9 7:4	<b>formulating</b> 66:10	87:14,16,19,24
176:18 178:17	<b>florida</b> 93:19	<b>forth</b> 35:18 53:15	88:1,4,8,19,25
180:16 181:18,22	<b>flow</b> 50:20 123:13	93:11 101:13	89:5,8,10,13,17
184:2	123:13,14 162:19	113:11 114:2	89:19 90:4,7,9,12
<b>finding</b> 126:10	162:19	147:25 167:14	90:16 153:5,7,8
161:13 163:1,17	<b>fly</b> 104:21 164:10	182:17	153:25 154:6,11
183:3 184:4,6	<b>fochier</b> 6:4	<b>forward</b> 30:7	154:16 155:1,9,12
<b>findings</b> 176:8,9	<b>focus</b> 116:18	65:18 113:7	155:15,21 156:5,9
<b>fine</b> 60:21,22	186:2	141:10 145:18	<b>fox's</b> 62:11 64:12
120:4 124:16	<b>focused</b> 126:22	164:15 169:15	70:12
128:17 132:22	179:21	<b>found</b> 25:22 29:19	<b>fractional</b> 77:6,9
137:24 147:20	<b>focusing</b> 87:1	64:6 99:21 113:7	<b>frankenstein</b>
148:4 152:6 153:3	159:20,20	117:15 181:22	107:9
154:11	<b>foley</b> 6:14	<b>foundation</b> 22:8	<b>frankly</b> 61:13
<b>finished</b> 76:5	<b>folks</b> 155:10	<b>four</b> 25:19 33:4	62:8 63:7 64:1
<b>firm</b> 6:1 12:18	<b>followed</b> 29:25	179:19	65:15 66:22 98:11
108:4 163:15	177:23	<b>fourth</b> 16:9	104:25 119:14
<b>firms</b> 12:11	<b>following</b> 10:12	<b>fox</b> 7:15 17:8,9,14	145:12 148:23
158:21 159:1	12:23 15:24 19:3	17:17 21:7,20	149:8 151:8
165:16	148:12	23:17 29:6,9,13	158:12 159:7
<b>first</b> 13:19 15:22	<b>follows</b> 58:3 83:25	29:16 30:24 42:15	169:16 183:2
24:2 27:1 53:9	84:3	42:21,25 43:2,6	<b>fraud</b> 71:18
70:11 74:16 98:11	<b>food</b> 92:18	43:10,15,18,21	<b>fraudulent</b> 64:1
112:6 121:3	<b>footnote</b> 81:12	44:1,8,13,15,19	71:4,19 146:4
129:21 132:17	<b>forbearance</b>	44:21,24 45:1,17	<b>fraught</b> 99:7
139:11 145:23	158:7	45:21,25 46:3,6,8	<b>free</b> 105:17
149:20 150:24	<b>force</b> 168:6	46:12,16,24 47:2	<b>friday</b> 158:3
153:8 167:4	<b>forced</b> 105:19	47:5,19,23 48:1,5	165:21 166:2,15
180:19	<b>foregoing</b> 189:3	48:9,12,15,25	166:21 185:20
<b>firsthand</b> 50:21	<b>foreign</b> 151:10	49:3,6 54:13,16	<b>friedberg</b> 8:11
<b>fitzgerald</b> 9:13	<b>forever</b> 64:21	55:14,18 63:9	<b>friedmann</b> 3:17
<b>five</b> 33:4 49:13	<b>form</b> 14:3 23:3	65:19 75:25 76:2	<b>froms</b> 30:10
170:6	24:9 30:25 31:14	76:12,14,16 77:8	<b>front</b> 73:22 86:13
<b>fix</b> 152:18	33:12,21 35:9,19	77:11,14,19 78:1	154:9 161:2,5
<b>fixed</b> 85:3	37:15,21 38:11,24	78:3,10,21 79:1,4	<b>frontloading</b>
<b>flesh</b> 67:21	39:12 40:7,25	79:7,10,12,18,20	164:4,6
<b>flexibility</b> 103:25	51:24 52:15 91:14	80:12,20,24 81:5	<b>fros</b> 64:10
<b>flexible</b> 92:23	93:5 182:9	81:11,16,21 82:4	<b>fruit</b> 161:19
102:5		82:12,15,19,22,25	165:12

<b>frustrate</b> 142:23	<b>g</b>	<b>given</b> 57:11 58:24	121:10 124:8
<b>full</b> 13:22 96:3	<b>g</b> 10:1	80:1,14 92:14	130:20,20 131:7,8
146:1 150:5 158:1	<b>game</b> 107:15,17	95:16 96:25	143:6 157:6
168:6 180:24	107:23 131:21	103:19,24 104:9	161:17 174:21
181:7	162:6	104:14,18,20	178:7 186:25
<b>fully</b> 99:18 129:24	<b>garment</b> 6:3	109:6 126:19	<b>going</b> 10:15 14:24
150:8 167:21	<b>garrett</b> 168:15	158:4 165:7	18:5,7 22:6 23:20
<b>function</b> 75:10	<b>gather</b> 41:8	172:11 176:17	38:17,25 56:11
<b>fund</b> 15:5 108:23	<b>gem</b> 6:7	181:8 182:10,22	60:16 62:8 64:7
109:6 111:5 132:9	<b>genender</b> 4:6 21:5	183:22 185:8	64:17 67:8 68:24
135:23 136:2	21:8,18 22:6 23:2	<b>gives</b> 64:24 84:17	71:9 73:20 74:11
140:19 143:16	23:16 24:9 28:15	110:5 112:11	80:6 81:18 82:11
<b>fundamental</b>	30:23,24 31:13	<b>giving</b> 57:11	84:3 90:2 91:3
77:20 98:2 115:12	33:10,11,21 34:1	71:10 86:4,6	106:22 107:15,18
<b>fundamentally</b>	35:8,18 37:21	<b>global</b> 4:16 10:14	107:25 108:4
98:19	38:6,6,11,16,24	10:17 183:15	111:9 113:5,11
<b>funded</b> 113:5	39:11 40:7,25	<b>go</b> 13:19 14:4 15:5	114:2 115:11,17
136:5 139:22	51:23 52:15	19:13 20:3 22:12	117:17 121:4,13
140:12,15	<b>general</b> 37:23	29:15 32:19 36:9	127:11 136:1
<b>funding</b> 14:23	43:14 91:6 118:15	36:9 42:19 48:20	139:5 141:10
114:22 116:5,25	165:3 167:12	49:12 63:6 65:18	142:20,21,22,23
135:14 136:3	<b>generally</b> 33:17	65:21 74:2 80:23	143:18 144:14,17
138:5 139:12	95:24 101:10	80:25 107:19	145:4,5 147:14,20
141:1,22 142:7,13	138:23 160:12	109:20 111:18	148:12,14 150:13
144:4	165:11 180:21	113:17 114:25	152:10 157:13
<b>funds</b> 14:21 15:5	<b>geron's</b> 187:17	125:1 127:21	159:12 160:21
26:13 40:6 50:20	<b>getting</b> 47:20 59:4	130:12,22 131:14	161:11,14 164:10
63:6 81:22,22,23	66:18,19 71:20,21	133:21 134:5	164:15 165:13,19
82:5 107:10,25	72:11,20 83:19	136:2,2,3 141:8	166:22 167:1
109:3,25 111:11	86:13 87:7 128:8	141:18 144:4	186:9 187:22
112:9,19 113:12	134:18 141:19	145:11,18 149:20	<b>gold</b> 7:23
113:13,15,16,17	144:20,24 153:15	150:16 153:2	<b>good</b> 10:2,4 12:21
114:22 116:4,8,9	165:5 186:18	158:12 161:22	61:19 67:18 70:8
117:22 118:4	<b>gianis</b> 8:2	162:25 165:9	84:8 96:19 98:8
123:13,14,14	<b>gift</b> 86:5	167:1 168:14	101:6 104:8
136:14 141:18	<b>gifted</b> 81:24	169:14 176:8	105:23 109:12
<b>funk</b> 55:15	<b>give</b> 10:8 16:4	178:21	129:17 149:9
<b>further</b> 51:2	56:12 81:9 109:23	<b>god</b> 82:12	150:17 151:23
112:12 164:16	114:7 118:25	<b>goes</b> 42:12 44:4	157:6 161:21
177:18 186:3	126:3 133:15	47:17 68:24 70:15	172:14 176:18
<b>future</b> 96:2 97:7	146:2 157:24	70:16 73:11 84:7	181:12
125:4,21 126:24	164:22	85:4,6,15 113:17	<b>goods</b> 25:4,8 28:7
131:14,22,23		115:1 118:15	

<p><b>gotshal</b> 3:12 4:1 10:5 61:20 168:16 169:19 <b>gottlieb</b> 5:1 69:14 <b>grain</b> 144:13 <b>grains</b> 144:15 <b>granted</b> 150:5 <b>grappling</b> 137:10 <b>great</b> 60:21 112:11 <b>greater</b> 181:5 <b>greene</b> 8:13 <b>greenwich</b> 5:18 <b>griffith</b> 178:16 <b>grossing</b> 30:9 <b>grossly</b> 55:4,9 <b>grounds</b> 104:5 177:5 <b>group</b> 6:6,15 7:3 28:3 92:18 99:5 101:22 137:3 175:22 180:15 181:20 <b>gu</b> 7:22 <b>guarantee</b> 52:18 54:8 55:9 58:7 59:2 65:6 82:7 84:16 85:2,14,23 86:22 <b>guaranteed</b> 27:25 53:21 55:22 57:14 <b>guarantees</b> 26:13 53:4 54:3 59:4,12 91:16,17 98:16 <b>guarantors</b> 24:3,8 42:7 84:17 <b>guaranty</b> 5:9 67:20 68:11 <b>guess</b> 42:10 43:11 65:21 76:25 77:8 99:14 114:1 117:12 118:15 132:14 133:7</p>	<p>163:12 171:17 175:7 185:19 <b>guise</b> 59:6 <b>gump</b> 3:3 12:7 70:9 108:13 <b>gustavo</b> 9:17 172:15 <b>guys</b> 135:7 155:25 160:20</p> <p><b>h</b></p> <p><b>h</b> 4:20 92:3 <b>hadley</b> 4:8 <b>hale</b> 5:15 145:22 <b>half</b> 62:5 94:5 99:8 103:16 <b>hamilton</b> 5:1 <b>hand</b> 37:14 98:19 100:25 123:25 178:14 <b>handed</b> 17:15 <b>handful</b> 110:5 166:19 <b>handling</b> 32:22 <b>hanging</b> 161:19 165:12 <b>happen</b> 74:3 141:2 163:14 174:11 <b>happened</b> 142:21 <b>happening</b> 43:2 153:20 163:16 <b>happens</b> 14:10,10 14:11 47:13 109:19 130:23 135:6 <b>happy</b> 16:6 65:14 66:11 148:13,13 148:19 151:17 <b>hard</b> 80:5 <b>harm</b> 59:2 <b>harmed</b> 101:8 <b>harris</b> 9:10 167:5 167:5,8,12 169:22</p>	<p><b>hasn't</b> 113:22 116:16,18 <b>hauer</b> 3:3 <b>haven't</b> 106:13 126:15 127:12 <b>head</b> 60:19 120:17 <b>healthier</b> 72:17 <b>hear</b> 124:2 150:3 <b>heard</b> 28:9 62:12 145:7 149:1,2 158:16 168:8,9 170:6 172:7 <b>hearing</b> 2:1,1,2 10:7,12 11:22 12:23 16:6 17:3,9 94:2 95:24 114:6 138:1 156:25 166:2,15 187:9 <b>hearings</b> 81:8,10 186:8 <b>heeled</b> 101:23 <b>heilman</b> 8:23 <b>heitenrater</b> 8:24 <b>held</b> 91:13 111:16 115:19,23 116:1 116:21,22,25 118:22 121:8 136:23 159:21 164:14 <b>helen</b> 6:2 <b>help</b> 59:3 73:3,4,7 74:1 136:19 <b>helped</b> 162:4 185:25 <b>helpful</b> 153:16 <b>hey</b> 48:19 <b>hiatus</b> 178:6 <b>high</b> 20:16 21:23 160:19 <b>higher</b> 131:13 132:5 160:18 <b>highlighted</b> 62:5 65:9</p>	<p><b>highlights</b> 99:17 <b>highly</b> 95:22 147:12 <b>history</b> 32:4 <b>hits</b> 83:2 <b>hk</b> 6:4 <b>hmm</b> 42:21 43:21 46:6 <b>hoc</b> 6:15 156:16 157:4 186:16 <b>hoffman</b> 7:2 <b>hold</b> 50:18 87:21 133:17 141:9 159:12 <b>holdback</b> 161:11 162:10 163:4 <b>holdbacks</b> 164:16 <b>holdco</b> 5:2 <b>holder</b> 68:10 69:16 106:3 114:18 131:16 177:11 178:2 <b>holders</b> 55:21 58:7 60:2 102:10 <b>holding</b> 24:19 66:24 96:4 <b>holdings</b> 1:7 2:3 10:2 26:11 91:18 92:20 100:7 <b>holdsun</b> 6:6 <b>holste</b> 8:25 <b>holt</b> 8:8 <b>home</b> 83:2 <b>homes</b> 123:4 <b>hon</b> 1:22 <b>honor</b> 10:4,6,12 10:17,20,24 11:1 11:10,13,15,19 12:6,20,23 13:2 14:2,4,5 16:3,18 17:6,14,17 18:3,8 18:15,23 42:15 47:5 52:23 55:14</p>
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

55:20 60:18 61:8 61:9,19,21 65:7 66:15 67:7,14,18 69:6,11,13 70:6,8 71:17 75:23,25 76:2 78:4 80:7 81:16,21 82:19 85:9 86:12 89:19 89:21 90:4,20 105:23 106:2,9,15 107:4,12,21,24 108:9,19,25 109:10,17 110:1,5 110:10 111:7,24 112:15 113:14,25 114:7,8 115:5,24 116:3,22 117:14 118:16 119:3,19 119:21 120:23 121:15 122:5,11 122:22 123:6,11 123:16 124:4,6,16 125:7,9,17,25 126:8,17 127:3,13 127:19,23,25 129:4,7,9,14,17 129:20,25 131:15 131:23,25 132:19 132:25 134:8,18 135:3,16 136:9 137:24 138:6,16 139:11,15 140:1 141:5,24 143:9,10 144:12,21 145:14 145:19,21 146:11 146:13,16,25 147:20 148:5,20 149:6 151:9,25 152:2,22 153:5,17 154:16 155:9 156:11 157:12 158:11,15 159:11 159:23 160:2	162:11 163:2,4,13 164:20 165:15 167:5 168:15 169:6,10,15,22,24 170:4,12,23 171:4 171:12 172:14 173:12,19 174:4,6 174:24 176:4 186:12 187:8,11 187:23 <b>honor's</b> 130:5 <b>hoo</b> 9:2 <b>hope</b> 17:11 79:5 <b>hopeful</b> 169:10 <b>hopefully</b> 14:12 42:18 <b>hopeless</b> 28:8 <b>hopelessly</b> 54:25 107:5 <b>horse</b> 106:10 <b>hour</b> 157:23 <b>hours</b> 89:11 <b>housekeeping</b> 186:15 <b>hr</b> 27:13 <b>huffman</b> 27:11 <b>hundred</b> 13:22 145:5 <b>hung</b> 47:8 166:10 <b>hurt</b> 120:3 <b>hutcher</b> 4:15 <b>hyde</b> 2:25 189:3,8 <b>hypothetically</b> 23:3 <b>i</b> <b>i.e.</b> 92:9 95:3 172:8 178:22 180:4 181:15,24 184:22 <b>idea</b> 51:19 <b>ideal</b> 41:16 <b>identified</b> 30:8 78:15,17	<b>identifies</b> 36:13 <b>identify</b> 39:18 67:24 <b>identity</b> 92:11 <b>ignore</b> 70:22 <b>iii</b> 52:8,10,13 <b>il</b> 5:11 <b>illinois</b> 149:21 167:22,25 <b>immediate</b> 71:2 72:1,3 158:7 <b>immediately</b> 153:11,11,23 154:1,10 177:23 <b>impact</b> 70:13 85:23 <b>impacting</b> 171:21 <b>impaired</b> 112:18 112:18 <b>implement</b> 178:10 <b>implementable</b> 110:13 <b>implementation</b> 173:13 <b>implemented</b> 98:25 <b>implication</b> 111:23 112:8 182:4 <b>implications</b> 125:22 <b>implicit</b> 104:19 <b>import</b> 11:24 <b>important</b> 27:20 57:3,17 89:22 96:15 97:24 108:7 110:9 154:7 158:19 <b>importantly</b> 28:12 78:4 95:10 161:19 <b>imposed</b> 80:19	<b>impossibility</b> 99:23 <b>impossible</b> 18:12 62:8 <b>imprimatur</b> 147:14 148:22 <b>improperly</b> 151:24 <b>inaction</b> 182:18 <b>inactive</b> 182:24 <b>inadvertence</b> 128:6 <b>inappropriate</b> 60:25 <b>incentives</b> 180:10 <b>inception</b> 60:5 <b>inclination</b> 162:8 <b>include</b> 11:3 16:25 45:4 74:22 75:2 93:23 130:10 143:14 179:3 <b>included</b> 14:9 18:21 25:19 <b>includes</b> 181:1 <b>including</b> 78:6,7 81:19 91:7 96:11 97:9,10 98:3,15 101:7 104:19 105:13 114:15,19 114:21 117:21 118:2 120:14 126:24 138:22 147:9 148:2,9 176:24 177:1 178:10,15,17 179:25 182:15 184:1,24,25 <b>inconceivable</b> 29:11 <b>inconvenience</b> 97:8 <b>incorporate</b> 133:14
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<b>incorporates</b> 94:21	<b>individual</b> 38:4 39:18 47:4,14	<b>insurer</b> 150:19 152:10	<b>interim</b> 161:1
<b>incorporating</b> 124:12	48:3,7 81:17,18 82:8 103:3	<b>insurers</b> 149:22 149:24 151:4,15	<b>interlinked</b> 102:18
<b>incorrect</b> 29:20 30:1	<b>individuals</b> 16:20 41:8	151:23 152:19	<b>internal</b> 27:14
<b>incorrectly</b> 29:23 33:5	<b>inducement</b> 11:24	<b>integrated</b> 39:20 39:23 40:6 42:10	<b>international</b> 6:7 171:6
<b>increased</b> 142:7 142:13	<b>industrial</b> 6:5	43:1,8 45:11	<b>interplay</b> 37:1
<b>increment</b> 11:3	<b>industries</b> 6:5 10:14,17	<b>intended</b> 119:17 120:8 121:10	<b>interpret</b> 88:13 122:24 149:16
<b>incremental</b> 12:5	<b>inevitably</b> 186:4	176:20	<b>interrelationship</b> 92:2
<b>incur</b> 155:11	<b>infer</b> 182:14	<b>intends</b> 182:24	<b>interstate</b> 51:23
<b>incurred</b> 59:21 66:22 74:9,21	<b>inferred</b> 182:9	<b>intention</b> 117:21 153:13 154:22	<b>investigation</b> 100:3 109:8,9
155:12 186:17	<b>influence</b> 95:15	182:22	147:12,23
<b>indenture</b> 7:11 73:25	<b>information</b> 14:13 21:3 22:19 37:24	<b>intents</b> 63:21	<b>investment</b> 120:3
<b>indentured</b> 17:21 59:15,20,21 60:1	39:13 41:9 42:9 53:12	<b>inter</b> 36:3	<b>investor</b> 120:2
60:8,15 61:2	<b>informed</b> 179:13 180:25	<b>intercompany</b> 22:14,20 28:19,21	<b>invoices</b> 25:4,6,10 25:17 128:5
75:13 88:2 89:1	<b>informs</b> 95:20	28:25 29:12 30:4	<b>involved</b> 21:12,22 23:5 50:16 54:1
101:22 105:12,16	<b>initial</b> 10:25 11:1 13:12,18,20 19:13	30:19 31:6,11	137:21 169:3
154:18,23	19:13 20:9 71:3 72:2,2 144:4	32:3,10 33:1	<b>involving</b> 149:22
<b>independent</b> 66:17 67:25 68:4	<b>injuncted</b> 173:3	34:11,12,23 35:5	<b>ireland</b> 170:21
95:16 98:14 99:20	<b>injunction</b> 133:7 173:1,11	35:6 36:6,14,14	<b>iridium</b> 93:9,11 97:4,25 98:3
<b>indicate</b> 24:3,8 25:20	<b>inquiries</b> 92:8	36:22 37:1,3,5,7,7	100:21
<b>indicated</b> 26:5 36:6 66:7 67:13	<b>inside</b> 70:23 71:5 71:25 72:4	38:3 39:1,4,5,6,7	<b>island</b> 170:21
156:25	<b>insistence</b> 97:1	40:5,13 42:19	<b>isn't</b> 86:25 88:12 94:9 109:5
<b>indication</b> 31:12 33:22 53:16 56:21	<b>insolvency</b> 22:1 76:24 77:4 78:23	43:4 44:6 49:5,6,7	<b>issue</b> 11:15,24 19:15 27:18 33:9
<b>indirect</b> 173:7	<b>insolvent</b> 22:25 63:25 70:24 71:19	49:9,19,24 50:6	54:15 59:9 65:16
<b>indirectly</b> 173:5	78:12 81:25 96:14 107:6	62:4,10,24,25	70:14,20,22 71:11
<b>indiscernible</b> 34:2 44:6 56:5 73:9	<b>instances</b> 46:5	70:20 71:6 72:5	75:21 78:5,18,20
74:3 124:12	<b>insurance</b> 63:12 149:9,12 150:1,17	76:9 100:13 103:6 103:7	90:18 91:4 98:1
131:13,15 132:23	151:1,8 152:5,13 173:6,6	<b>intercreditor</b> 51:23	98:12 110:4 113:8
152:15 171:6		<b>interest</b> 15:20 95:18 97:14	115:12 117:14,18
183:11		137:21 139:19	121:21,23 123:12
		146:1 153:24	123:13 127:22
		167:20 180:20	133:6,18 134:3
		<b>interests</b> 97:10 101:17	139:23 141:25 144:19 146:18

156:20,21 157:6 157:14,16,22 158:16,19 166:5 168:1 171:12,21 175:11,21 176:1 180:22 182:3,5 183:9 <b>issues</b> 12:9 14:8 14:20 18:9 19:11 53:8 57:8 60:23 66:21 77:3 79:9 90:24 93:5,6 94:8 94:20,20 96:10 100:18 106:13 107:18,20 110:5 116:15 124:22 141:23 160:3 166:20,25 186:5 <b>it'll</b> 140:6 141:13 168:25 <b>italics</b> 149:10 <b>item</b> 186:15 <b>items</b> 64:2 <b>it'll</b> 83:2 <b>it's</b> 79:2 80:18 81:3,3,5,6 82:4 83:5,12 84:2,5,6 85:1 86:3 87:5,16 87:22 88:19,21 89:3,22 90:13,14 90:15 95:22 99:24 107:17 108:6,7,10 110:1 111:19,21 111:25,25 112:1,1 112:2 113:4 114:14 115:5,22 115:25 116:1,14 116:20,25 117:2 118:1,8,14,18,21 119:14 120:4,7,7 120:8 121:5,7,7,7 121:8,13,13 122:24 123:2,12	124:13,17 126:4 126:23 128:17,18 130:19,21 131:1 131:17 133:5,11 133:12,12 134:11 134:22 135:6 <b>i'd</b> 107:12 <b>i'll</b> 106:9 107:2 109:16 114:7,8 116:3 120:23 121:19 125:25 127:21,22 130:22 133:21 <b>i'm</b> 79:9 80:13 84:24 85:6,8,17 86:2,9,11,12,13 86:17,19 87:1 89:3 90:25 91:3 100:8 106:22 107:18 108:7,25 109:1,10 118:16 120:20 122:18,20 122:22 123:1 126:22 127:11 128:22 130:15 132:1,19,20 133:9 133:11 134:12,15 134:16 <b>i've</b> 93:15 <b>j</b> <b>j</b> 5:6 6:19 7:19 <b>jacqueline</b> 3:18 <b>janjana</b> 9:7 <b>january</b> 36:1 <b>jared</b> 3:17 <b>jason</b> 9:7 <b>jobs</b> 60:16 <b>joe</b> 156:11 <b>john</b> 9:19 <b>joined</b> 28:10 95:6 <b>joining</b> 68:11 <b>joint</b> 2:2 25:19 57:13 66:2	<b>joseph</b> 6:12 9:9 <b>judge</b> 1:23 14:19 55:15 97:16 123:4 132:3,5 157:16 160:6 163:3 166:12,13 182:5 182:12 183:2 185:12,13 <b>judgment</b> 97:10 167:18,20 <b>judicata</b> 184:24 <b>judicial</b> 27:22 53:24 54:2 <b>julie</b> 9:4 <b>junior</b> 184:8 <b>justification</b> 56:20 57:1 58:13 <b>justify</b> 23:9 78:13 <b>k</b> <b>k</b> 44:4 48:19,20 52:18,20 53:3 59:12 63:11 64:21 70:24 71:1,18,25 92:3 <b>kadish</b> 9:1 <b>kathleen</b> 8:14 <b>kcd</b> 56:12,17,23 66:13,16,17,23,25 67:3,25 68:5,9,10 68:14,16 69:1,15 69:16,17 95:12,16 95:18,18,19,21,22 102:18 103:23 104:11,20 <b>kcd's</b> 95:20 <b>keep</b> 32:17 36:21 41:3 58:4 88:23 118:6 119:11 163:16 187:7 <b>keeping</b> 33:7 <b>kept</b> 37:19 40:12 40:19 43:6 44:19 44:21 160:19	<b>key</b> 149:10 <b>keys</b> 17:15 <b>kheel</b> 92:3 <b>kick</b> 16:18 <b>kicker</b> 145:2 <b>killer</b> 79:19 <b>kim</b> 9:2 <b>kimberly</b> 8:2 <b>kind</b> 35:17 60:19 109:18 147:22 162:14 177:9 <b>kinsella</b> 9:11 <b>kitchen</b> 78:7 <b>kmart</b> 22:1,23 23:1 24:19,23 79:3 82:11 85:2 85:23 96:13 <b>knew</b> 23:13 27:7 50:23 59:3,4,4,5 <b>know</b> 11:23,23 12:4,8,15,17 14:9 14:11,13,25 15:17 15:19,21 16:21 19:20 20:3,13,21 20:23,24 21:6,8,9 21:10 22:2,3 23:16,25 25:8,9 26:25 27:12 28:2 34:2,3 35:21 37:24 41:10,17 42:6,17,22 43:11 44:2 45:9 46:17 46:24 47:2,6 49:17,18 50:4,16 50:22 51:25 52:16 58:8 61:3,24 62:6 62:17,19,19,21,22 63:7,10,12,24 64:1,10,19 65:17 65:18,23,24 66:19 66:20,21 71:13,14 76:9 82:2 88:21 88:23,24 89:4
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

90:25 108:19 117:9 119:13,14 121:12 125:11 127:2,9 130:14,16 132:1 138:6,7,8 139:2 141:23 144:6,7,7,12 145:15 151:22 153:13,16 157:1 158:18,21,22,25 158:25 159:10,12 159:13,17 160:25 161:10,17 162:24 163:10,25 164:16 164:25 165:13,16 167:2 171:2 172:7 175:16 186:17,17 186:18,21 187:8 <b>knowing</b> 178:6 <b>knowledge</b> 50:21 54:6 92:1 97:16 <b>known</b> 27:15 <b>knows</b> 27:12 120:8 121:9 <b>koch</b> 8:21 <b>koltai</b> 9:3 <b>kosson</b> 8:15 <b>kreller</b> 4:13 90:20 90:20,23 91:2 105:23,24 106:2 106:15,17,20,22 107:21,24 108:9 108:15,19,21,25 109:3,14 111:13 111:18,21 112:1,5 112:8 113:25 115:2,5,8,21 116:22 117:2,6,11 117:14,25 118:6 118:11,13,16 119:1,3,7,9,12,19 119:21 120:1,21 120:23 121:3,6,15	121:19,21,23 122:5,8,11,16,19 122:22,24 123:6 123:16 124:4,6,14 124:16,21,25 125:4,25 126:6,8 126:17 127:2,5,7 127:10,13,15,18 127:23,25 128:11 128:13,16 129:2,4 129:7,9,14 <b>krinsky</b> 170:5 <b>I</b> <b>I</b> 3:9 7:7 92:3 <b>labov</b> 6:19 <b>lack</b> 22:7 180:23 <b>lag</b> 126:19 <b>laid</b> 97:4,24 102:13 103:23 183:14,14 <b>lampert</b> 146:8 <b>landed</b> 12:9,20 <b>landing</b> 22:15,17 <b>lane</b> 185:12 <b>language</b> 14:24 15:7 21:7 60:17 89:5 106:25 113:10,10,12,14 113:23 114:1,2,3 114:5,8,9,10 115:24 119:5 120:6 123:25 124:14 126:11 127:18 138:15 142:12 148:12,13 149:10 153:2,12 169:19 170:14,22 170:24 171:3 175:15 177:1 <b>lanier</b> 3:10 <b>lardner</b> 6:14 <b>large</b> 26:7,16 98:15 102:1 120:5	<b>largely</b> 53:6 56:9 119:18 <b>larger</b> 76:24 <b>largest</b> 66:8 94:22 101:2 119:21 <b>late</b> 157:23 <b>laundry</b> 59:23 60:6 <b>law</b> 6:1 61:13 65:3 108:4 123:23 124:5,15 158:21 162:18 182:3,4,15 183:9 184:3,24 185:11 <b>lawfully</b> 136:18 <b>lawsuit</b> 132:9 144:4,21 <b>lawsuits</b> 165:17 <b>lawyer</b> 23:15,20 52:12 64:25 136:4 <b>lawyers</b> 54:15 65:2 98:8 <b>laying</b> 29:1 78:10 <b>lead</b> 103:21 186:5 <b>leads</b> 106:18 111:23 <b>leave</b> 18:2 49:20 148:20 <b>leaves</b> 68:14 110:15,16 <b>leaving</b> 46:9 47:9 <b>led</b> 21:14 <b>ledanski</b> 2:25 189:3,8 <b>ledger</b> 37:23 <b>lee</b> 7:19 <b>left</b> 10:7 17:7 31:5 106:10 170:9 172:10,16 <b>legacy</b> 32:7 <b>legal</b> 12:1 23:20 23:21 25:18,18 66:22 91:13 105:4	105:8 121:14,16 149:2 161:23 163:19,19 189:20 <b>legally</b> 132:12 <b>legitimate</b> 98:8 105:17,18 143:19 157:17 <b>lend</b> 47:24 81:25 83:6 <b>lenders</b> 24:6 43:18 <b>lending</b> 47:17 68:25 <b>lends</b> 42:16 <b>length</b> 97:20 <b>lengthy</b> 99:6,12 183:19 <b>lent</b> 47:16 81:24 <b>leslie</b> 8:23 <b>letter</b> 173:17 187:17,18,20,21 <b>let's</b> 134:1 <b>level</b> 20:16 21:23 31:6,10 99:11 116:25 <b>lexis</b> 183:11,16 <b>lexus</b> 91:20 <b>liabilities</b> 44:18 46:23 91:11,12,14 133:4 <b>liability</b> 149:12 <b>liberty</b> 4:10 5:3 <b>lien</b> 65:15 73:1,6 73:18,20,22,23 87:12,21 88:3,15 88:18 105:3 155:6 170:25 171:2 <b>liens</b> 90:5,7 <b>lift</b> 168:1,7,9 169:9 <b>ligee</b> 7:22 <b>light</b> 100:21 152:22 156:14
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

162:8 176:23 178:12 187:18 <b>lii</b> 8:16 <b>likelihood</b> 96:10 97:7 99:17 180:3 <b>limbo</b> 128:3,18 <b>limit</b> 105:11 149:18 <b>limitation</b> 105:15 114:21 <b>limited</b> 6:5 34:20 35:7 55:4 63:6 91:8 105:3 <b>limits</b> 114:17 <b>linda</b> 9:15 <b>line</b> 20:7 32:6 37:15 150:20 166:10,13,14 <b>lines</b> 36:9 <b>linked</b> 96:21 <b>liquid</b> 138:8 <b>liquidate</b> 65:21 <b>liquidated</b> 137:5 160:24 <b>liquidating</b> 59:17 59:25 60:2 114:12 114:17,20,25 115:8,9 116:7,8 117:3,21 130:9 131:19 132:8,24 138:8 139:18,20 139:20,21 140:15 142:9,11,15 143:16 160:23 <b>liquidation</b> 16:12 22:21 28:22 66:3 88:9 89:14 104:24 130:20 177:18,20 <b>list</b> 25:7 26:23 59:23 60:6 <b>listen</b> 159:14 163:2,15	<b>lists</b> 53:7 88:23 <b>literally</b> 62:9 117:8 <b>litigate</b> 120:9 <b>litigated</b> 60:24 186:5 <b>litigating</b> 79:8,9 155:20,23,24,25 <b>litigation</b> 5:16 14:22 16:18,21 20:12,19 21:1,2 51:23 52:8,11,14 58:14 78:19 80:22 80:25 82:3,4,17 87:5 97:8 100:22 108:4,23 111:5,6 111:7 113:2,2,17 113:18 114:22 116:5 117:9 119:17,24 120:3 128:4,19,21 133:15 135:3,11 135:14 136:3 139:17 141:3,23 142:8,14,17 144:10 145:23 147:9,17 149:3,21 149:23 150:4,5,8 155:7,14 156:8 165:9,10 179:16 179:25 <b>litigation's</b> 97:6 <b>litigators</b> 139:8 <b>little</b> 18:14 64:4 65:7 67:20 80:5 85:16 86:3,8,25 153:15,25 170:20 <b>live</b> 114:9 132:23 167:3 <b>llc</b> 5:2 93:12 <b>llp</b> 3:3,12 4:1,8,15 5:1,8,15 6:8,14 7:1,9 90:21	105:24 <b>loans</b> 24:2,7,9 25:2 26:17 27:24 27:24 28:6 <b>located</b> 27:11 <b>locke</b> 5:8 67:19 <b>long</b> 17:9,18 37:25 98:9 106:18 107:6 109:24 116:20 124:8 127:5,7 151:23 165:10 179:20 184:25 <b>longer</b> 179:10 187:8 <b>look</b> 12:3 18:18 24:14 25:15 27:23 32:3 37:2 45:2 49:12 69:21 71:2 77:19 86:20 92:16 98:6 114:7,8 116:12 120:4 133:5 137:4 138:3 140:3 148:9 155:17 159:3 <b>looked</b> 22:20 24:12 25:11 26:3 29:18 52:2 <b>looking</b> 34:6 35:10 70:1 71:8,9 72:12,13 85:8 117:19 139:9 156:20 157:7 166:3,3 <b>looks</b> 95:9 96:12 123:14 128:5 <b>loosely</b> 99:21 <b>lord</b> 5:8 67:19 <b>lose</b> 54:9 85:24 <b>losing</b> 82:19 <b>lot</b> 45:11,12,14 53:12 54:11,14 82:18,20 83:3	89:3 94:2 160:2 161:25 162:18 165:1 183:9 <b>lotempio</b> 7:21 <b>lots</b> 150:16,16 <b>low</b> 89:2 90:2,10 161:19 165:12 <b>lower</b> 83:3 90:14 <b>lowest</b> 64:15 109:16 <b>lumping</b> 104:12 <b>lunch</b> 19:25
<b>m</b>			
<b>m</b> 7:15 52:8,10,13 <b>m3</b> 28:10 <b>maeghan</b> 8:9 <b>magnitude</b> 109:5 <b>main</b> 29:14 49:2 <b>maintained</b> 98:22 <b>majority</b> 26:12 62:6 101:15,15 102:1 <b>making</b> 14:8 18:15 50:22 68:22 73:12 74:9 89:24 99:1 125:23,24 <b>mall</b> 166:5,9 172:6 <b>managed</b> 69:9 <b>management</b> 27:14 31:9 37:2 37:11 39:20,23 40:6,24 41:4,24 42:3,11 43:14 48:21 62:13,18,20 63:4,11 70:13,15 70:17,25,25 71:7 71:9,15,15,19,23 71:24 72:3,4,7,12 98:20 100:15 <b>manager</b> 67:25 68:4			



<b>managers</b> 67:24	<b>mean</b> 29:8 32:8,16	185:11	139:4,22 140:16
<b>mandate</b> 16:24	32:21 37:13,14	<b>mention</b> 16:11,15	141:2,13 142:6,20
<b>manges</b> 3:12 4:1	39:16 41:7 57:13	<b>mentioned</b> 11:19	149:11,19 150:8,9
<b>manner</b> 65:10	63:16,20 73:7	<b>merchandise</b>	150:12,15 151:1,2
92:21 105:4 173:4	76:16 78:9 79:2	24:23	152:5 156:24
<b>mansheen</b> 6:5	81:8,17 84:23	<b>mere</b> 70:17	157:24 160:14,15
<b>marcus</b> 3:18	86:15,17,24,25	<b>merger</b> 54:19	160:16,18,20
187:4,7,11,14,23	88:22 103:7	64:21	161:15,16,18,20
<b>margin</b> 100:12	107:19 108:22	<b>meritless</b> 148:15	162:3,9,12,12,15
<b>mario</b> 167:4,6	115:12,20 116:14	<b>meritorious</b>	163:4 164:13
<b>marked</b> 24:15	116:20 118:9,9	147:13	165:13 178:9,21
112:10	119:2 124:5,11	<b>merits</b> 11:18	180:2
<b>market</b> 148:9,9	126:2,21 128:20	168:8,10	<b>millions</b> 36:15
<b>mart</b> 44:4 48:19	129:10 130:15	<b>mess</b> 64:2	37:22,24
48:20 52:18,20	138:10 140:3	<b>met</b> 33:17	<b>mind</b> 61:25 96:18
53:4 59:12 63:11	144:14,19,23	<b>metaphysical</b>	103:21 104:25
64:21 70:24 71:2	151:22 155:10,13	109:18	134:20 160:3
71:18,25	157:10 158:15	<b>method</b> 26:6	<b>minds</b> 58:18
<b>massive</b> 53:23	161:6,14 169:16	<b>methodology</b>	<b>mine</b> 184:16
<b>match</b> 30:20	174:1	28:18 31:2	<b>mineola</b> 189:23
42:13	<b>meaning</b> 153:11	<b>mh</b> 42:21 43:21	<b>mingle</b> 6:5
<b>matched</b> 30:6	155:3	46:6	<b>minimis</b> 74:8
<b>material</b> 98:8	<b>meaningful</b>	<b>mich</b> 162:20	<b>miniscule</b> 87:2
126:25	100:16 102:15	<b>michael</b> 7:7 9:6	<b>minkoff</b> 9:5
<b>materially</b> 186:3	179:17 181:2,4	<b>middle</b> 36:11,12	<b>minor</b> 170:13
<b>math</b> 86:18	<b>means</b> 34:22	<b>midnight</b> 120:25	187:18
<b>matrix</b> 30:9	38:23 39:17 82:18	<b>mien</b> 6:2	<b>minta</b> 8:19
<b>matter</b> 1:5 18:4	82:20 130:16	<b>milbank</b> 4:8	<b>minus</b> 151:1,2
45:6 55:5,5 61:12	153:12 173:4	<b>millbank</b> 90:21	<b>minute</b> 57:6 78:11
61:13 67:10 83:4	184:20	105:24	108:10
102:15 139:4	<b>meant</b> 30:7 65:19	<b>million</b> 10:20,24	<b>minutes</b> 170:6
167:21 180:4	104:7	11:2,2,3,21 12:5	<b>mirror</b> 31:23
186:16	<b>measures</b> 136:19	14:23,23 18:25	<b>missed</b> 11:11
<b>matters</b> 10:10	<b>mechanism</b>	19:1 56:3,3,4,13	176:1,7
84:13 155:7	128:21 180:25	57:4 66:13 67:6	<b>missing</b> 45:23
<b>matthew</b> 8:21	<b>mediate</b> 157:2	77:16,18 79:17	46:20 64:11,12
<b>maximizing</b>	<b>meenu</b> 6:7	82:18 85:15,16	171:8
176:21	<b>meet</b> 33:20	86:3,7,8 89:25	<b>misstates</b> 22:7
<b>maximum</b> 181:5	<b>member</b> 101:3	95:12 96:7 106:4	<b>mistake</b> 131:1
<b>mccloy</b> 4:8	<b>members</b> 26:24	107:25 108:10,14	<b>mittelman</b> 9:6
<b>mci</b> 54:19,21	157:4	111:5,25 112:1	<b>mixing</b> 90:16
<b>mcloughlin</b> 8:9	<b>memorandum</b>	133:16 135:4	<b>modern</b> 32:9
	93:25 102:14	136:5 138:9 139:2	

[modest - netted]

Page 28

<b>modest</b> 94:3 102:16 185:14	111:4 112:17,25 113:3,4,21 115:19 116:20 117:17 118:3,8 121:4,12 122:13 131:5 132:6,9 135:11,18 135:19,21,22,23 136:6 140:18 142:23 143:5,19 144:16,20 157:16 157:24 160:8 162:21 165:1	<b>multiple</b> 27:25 28:2 91:11 92:5 98:23 102:24 <b>murphy</b> 19:24 20:3 21:10,20 23:5,9,10,22 24:12,14 26:2,5 26:19 28:9 29:3 29:16,18 31:20 34:5,6,21 36:8,25 37:12 49:14,17 51:15 54:5 64:3 64:24 65:1,11 76:5,7 99:10 <b>murphy's</b> 30:15 31:5,23 41:19 48:15 62:16 64:25 <b>murphy's</b> 99:3 102:14 103:15 <b>murry</b> 6:4	124:11 132:20,20 133:22 134:7,13 141:19 152:18 163:17 165:14 176:9 177:18 179:23 184:4 185:14,15 <b>needed</b> 42:6,7 48:17,20 <b>needs</b> 38:4 42:13 94:9 133:1 <b>negate</b> 85:22 <b>negative</b> 43:25 55:11 155:25 <b>negotiate</b> 59:19 <b>negotiated</b> 53:1 96:17 144:3 159:6 159:11 <b>negotiating</b> 65:5 100:23 101:5 171:13 <b>negotiation</b> 96:20 121:11 <b>negotiations</b> 62:1 66:23 <b>neither</b> 12:25 13:15 14:12 37:6 39:6 45:10 174:12 174:14 180:15 181:12,18 183:7 <b>nester</b> 8:19 <b>net</b> 30:11 36:23 38:4,21 39:15 40:2 42:11 43:14 43:24,25 44:8,11 45:9 46:2,4,13 50:8,12 62:19 63:1,3,14,18,23 77:3 82:10 98:22 99:5 141:7 <b>netted</b> 36:7,16 37:20,25 38:9 45:18,21 46:8
<b>modifying</b> 138:21 <b>moloney</b> 5:6 129:17,18,20 130:14,16,22,25 131:4,8 132:19 133:3,9,11,20,24 134:4,7,10,15,18 134:22,25 135:9 135:15,18 136:9 136:11,13 137:2 137:13,17,20,23 138:15,20 139:4 139:14,25 140:4,8 140:18,22 141:15 141:24 142:3 143:8,22,25 144:6 144:12,17,20,23 145:6,14,19 <b>molycorp</b> 160:7 <b>moment</b> 114:8 143:22,23,25 <b>moments</b> 17:12 <b>monday</b> 59:14 <b>money</b> 34:23,24 38:16 41:20,21 42:3,6,8,16,17 43:6,7 44:4,9,11 45:11,12,15 46:17 46:18 47:20,21,25 48:17,17,20,20 49:8,10 54:11,14 58:4,6 63:13 70:14,15 71:8,8 71:13,18 72:20 73:11,19 74:2,4 78:16 89:2 110:25	<b>monies</b> 48:16 <b>monster</b> 107:9 <b>month</b> 19:6 21:17 <b>monthly</b> 128:5 <b>months</b> 28:11 62:5 80:22,24 82:17 99:8,15 107:8 110:2 180:4 <b>months'</b> 103:16 <b>moony</b> 71:10 <b>moot</b> 145:17 169:21 <b>mootness</b> 116:15 137:18 145:12 <b>morning</b> 17:2 114:3 137:25 146:20 <b>motion</b> 168:1,7,9 168:13 169:9,14 169:21 171:24 186:20 <b>move</b> 83:13 109:16 111:4 112:17,25 121:4 138:19,20 <b>moved</b> 30:7 38:1 76:20 <b>moving</b> 110:25 121:5,7 <b>multifactor</b> 97:21	<b>n</b> <b>n</b> 3:1 10:1 189:1 <b>n.d.</b> 93:18 <b>name</b> 25:7,18,25 <b>narotam</b> 1:25 <b>narrow</b> 167:16 <b>national</b> 7:10 <b>native</b> 58:23 <b>nature</b> 65:11 67:21 97:17 <b>near</b> 179:17 180:4 <b>nearly</b> 102:20 <b>necessarily</b> 107:11 143:6 158:14 <b>necessary</b> 50:5 111:8 178:10 <b>necessity</b> 59:1 103:2 <b>need</b> 35:14 44:1 47:7 48:19 49:12 57:8,21 63:9 83:17,18 118:22	

<b>netting</b> 46:14 72:7 83:15 100:14 <b>neutral</b> 101:19 <b>never</b> 17:10 24:12 25:11 26:3 28:22 51:14 60:10 89:13 <b>nevertheless</b> 31:25 56:10 83:4 94:12 178:19 <b>new</b> 1:2 3:6,15 4:11,18 5:4,19 6:10,17 7:5,13 54:22 81:7 92:2 107:19 133:1 149:22 <b>night</b> 120:25 156:17 187:13 <b>nominal</b> 130:6 <b>nomination</b> 95:17 <b>non</b> 45:3 50:11 52:18 59:7 66:6 76:6,22 85:14 95:2,11 171:23 172:23 178:12 182:5,15 184:10 <b>nonconsolidation</b> 21:16 22:5 <b>noon</b> 146:23 <b>normal</b> 75:7,17 77:1 87:25 88:14 182:2,4 184:3 <b>normally</b> 89:1 156:4 <b>north</b> 7:2 <b>notably</b> 19:1 <b>note</b> 12:22 27:20 61:1 89:22 91:9 107:12 128:1 177:22 184:14 186:22 <b>noted</b> 64:2,3 89:23 102:4 148:5 148:8 181:17	<b>noteholders</b> 52:19 54:21 68:12 73:15 74:7,12 87:23 88:14 <b>notes</b> 17:22 18:1 56:23 65:24 68:10 69:15,17 89:24 98:16 <b>notice</b> 2:1,1 14:4 15:16,17,21 27:22 53:24 54:2 81:9 124:18,21 125:1 125:13,14 126:3,5 146:20 147:14 148:22 158:6 171:11,17,19 172:4 175:4,18 180:20 182:14 183:21 <b>noticed</b> 82:8 166:8 <b>notion</b> 110:24 111:21 115:15 117:16 156:7 <b>notwithstanding</b> 106:24 114:11 <b>nuanced</b> 84:13 <b>number</b> 26:20 53:5 67:22 68:18 93:19 156:23 <b>numbers</b> 50:7,13 54:18 55:12,16 101:14,25 <b>numerous</b> 93:7 <b>ny</b> 1:14 3:6,15 4:11,18 5:4,19 6:10,17 7:5,13 189:23	<b>oakwood</b> 123:4 <b>oberg</b> 8:17 <b>object</b> 17:1 22:7 80:6 96:24 97:12 124:22 125:12 140:23,24 154:25 182:10 184:20 <b>objected</b> 61:15 101:20 104:5 117:8,17 120:24 144:3,9,24 171:10 172:22 173:23 184:5 185:5 <b>objecting</b> 59:22 60:6 73:9 75:13 94:11 119:15,16 130:8 <b>objection</b> 10:14 11:8 23:3 24:9 28:16 30:24 31:13 33:10,12,21 35:8 35:19 37:21 38:11 38:24 39:12 40:7 40:25 51:24 52:15 56:6 74:23 81:10 101:24 104:3,21 105:17 107:3 108:17,18 109:13 115:13 120:19 129:12,24 133:6 136:8 142:5 146:19 155:19 156:3 157:10,11 159:9 166:7,21 167:3,4,8,15 168:3 170:2,3,7 170:10,13 171:6 172:17 176:7,14 181:17 <b>objections</b> 57:19 57:20 94:4 106:24 107:3 129:11,20 165:22,23,25	166:16,17,19,23 166:23 170:17 177:5 184:13 <b>objector</b> 96:12 144:9 <b>objectors</b> 185:20 <b>objects</b> 104:22 <b>obligated</b> 74:13 <b>obligation</b> 37:10 <b>obligations</b> 28:2 37:4,5 49:7 123:21 <b>observations</b> 35:10 <b>obtain</b> 32:13 114:19 179:11 <b>obtained</b> 97:18 167:18 <b>obtaining</b> 181:5 <b>obv</b> 158:19 <b>obviate</b> 54:17 <b>obviously</b> 12:3 51:17 94:6 97:17 97:21 107:12 118:10 146:25 147:13 149:1 153:19 163:3,13 <b>occur</b> 58:15 95:16 96:2 145:23 163:23 <b>occurred</b> 35:25 58:14 60:11 74:6 148:23 <b>occurrence</b> 124:18 <b>occurs</b> 110:24 111:1 141:16 <b>october</b> 1:16 59:13 91:21 168:3 189:25 <b>offer</b> 182:20,25 <b>offered</b> 15:8 18:20 51:3
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<b>offeree</b> 182:19,23 182:24 <b>offeree's</b> 182:21 <b>offeror</b> 182:17,22 <b>offers</b> 21:4 <b>office</b> 26:24 <b>officer</b> 149:7 <b>officers</b> 97:18 <b>offices</b> 27:10 <b>official</b> 95:5 181:1 <b>offset</b> 10:18 <b>oh</b> 15:25 16:11 30:1 80:4 85:11 86:23 139:15 150:19 152:11 166:10 <b>okay</b> 10:2,11 11:5 11:14 12:10,19 15:14,25 17:5,6,7 24:16 25:6 26:15 33:23 34:14 36:19 38:19,21 39:25 40:4,12,15,21 41:2,11 50:18 61:15 67:12,15,15 67:16 69:3,12,23 70:5 72:22 75:9 75:12,22,24 76:15 78:1,12 89:5,18 89:20 90:22 91:3 105:22 106:16,21 109:2 111:12 112:4,7 116:12 121:20,22 122:23 123:1,15 125:10 125:19 126:6 127:14,24 128:15 129:1,3,8,10,16 130:22,24 131:3 139:13,25 140:17 140:21 145:20 146:14,17,24 147:3 148:1 149:6	151:19 152:1,14 153:4 154:6 156:5 156:6,10 158:11 158:12,18 164:8 164:11,17,21 165:21 166:12 167:11 169:7,22 169:23 170:16 171:5 172:6 173:20,22 174:5 175:3 176:1,5,6,7 186:24 187:2,24 <b>old</b> 49:15 64:19 189:21 <b>once</b> 131:22 162:23 <b>ones</b> 72:17 166:10 <b>one's</b> 82:20 <b>ongoing</b> 61:25 66:23 76:3 187:1 <b>open</b> 103:2 171:13 175:21 <b>operate</b> 51:1 <b>operated</b> 50:25 64:20 <b>operates</b> 164:15 <b>operating</b> 29:15 64:22 93:12 124:7 <b>operation</b> 26:16 <b>operations</b> 26:24 <b>opining</b> 33:15 <b>opinion</b> 33:9 51:17 102:2 183:20 <b>opinions</b> 33:22 34:1 <b>opportunity</b> 15:21 64:13 83:14 <b>opposed</b> 43:13 48:10 55:17 58:16 58:18 73:22 99:5 100:14 146:7,10 146:12 157:4	159:1 185:22 <b>opposes</b> 105:9 <b>opposition</b> 58:17 <b>opt</b> 11:7 12:25 13:1,10,10,11,11 13:12,15,15 14:10 14:11,12,12 180:16,16 181:6 181:18,19 183:7,8 184:18 185:2 <b>opted</b> 172:23 185:4,6 <b>optimist</b> 132:1 <b>opting</b> 175:25 181:3 <b>option</b> 181:6,10 182:10 185:1 <b>options</b> 181:8,13 183:24 <b>opts</b> 13:21 <b>oral</b> 185:20 <b>oranges</b> 90:16 <b>order</b> 14:1 15:13 16:19,22 17:4 35:14 49:15,23 50:11 51:8 62:21 81:25 87:11 105:6 107:1 110:6 111:14 113:7 114:17 115:25 120:12 122:2,7,8 122:9 123:3,19 124:10,18 126:8 126:14 128:1,10 128:11 130:7,17 130:19 132:16 133:14 134:14 141:19,21 142:21 153:8,9 157:14 159:4 161:1 163:17 164:3,14 176:25,25 178:22 185:15 187:11,12	187:18 <b>ordering</b> 91:23 <b>orders</b> 25:4,7 114:15 120:15 133:23 160:8 187:16 <b>ordinarily</b> 88:4 182:17 <b>ordinary</b> 36:15 105:12 110:18,19 112:21 155:7 <b>organized</b> 34:18 <b>originally</b> 94:24 <b>ought</b> 60:18 111:9 113:14,15,21 116:22 117:4 <b>outcome</b> 132:12 132:13 <b>outline</b> 64:9 <b>outside</b> 16:23 33:25 105:13 110:19 142:6 <b>outstanding</b> 26:17 27:24 110:9 168:22,25 169:1 <b>overall</b> 30:9 100:16 <b>overlapping</b> 26:23 <b>overreaching</b> 143:14 <b>oversight</b> 71:11 <b>oversimplified</b> 70:14 <b>overstated</b> 151:20 <b>overwhelmingly</b> 53:10 55:11,13 <b>owe</b> 38:5,6 39:5 40:2 41:20 43:15 71:14 <b>owed</b> 34:23,24 37:4,5,20 38:13 38:14 39:4 41:14
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[owed - people]

Page 31

41:21 43:18 45:10 45:12 46:2,4,9 47:20,22 63:11,12 63:13 91:12 165:6 <b>owes</b> 38:6,8 43:13 43:24 45:10,11,14 46:24 47:8 48:14 71:10,13,15 72:13 72:17 83:16 <b>owing</b> 47:4 48:8 62:20 63:23 99:5 <b>owns</b> 69:15	130:7 136:14 142:3,4 147:24 149:9 153:8 <b>paragraphs</b> 62:17 153:12 <b>paramount</b> 97:10 97:25 101:17 <b>paraphrasing</b> 35:3 <b>pardon</b> 146:11 <b>park</b> 3:5 6:9,16 <b>part</b> 25:13 28:3 32:6 34:14 46:19 68:1 69:20 70:21 90:17 103:4 121:11 130:17,23 136:13 158:10 161:13 183:6 186:23 <b>participate</b> 13:18 129:24 <b>participated</b> 61:3 61:4 <b>particular</b> 12:8 14:14 18:23 37:4 41:14 50:12 53:13 58:5 92:18 97:23 97:23 106:23 135:10 143:13 177:7 <b>particularly</b> 24:6 55:9 83:12 94:7 102:18 156:14 <b>parties</b> 10:16 13:3 15:20 17:1 20:21 20:24 21:6 62:3 63:24,24,25 64:17 65:5 76:20 94:10 97:13 100:10,23 110:13 124:22 149:14 153:23 157:1 158:4 159:18 164:2	166:23 168:17,20 169:3 170:21 172:22 173:2,11 180:20 181:18 182:1,14 183:7 185:7 186:6 <b>partners</b> 105:25 158:14,21 <b>party</b> 53:2 77:22 94:10 120:4 121:12 129:6 157:20 170:1 171:23,23 172:9 172:18,23,24 173:3 175:23,25 183:4 184:19 185:5 <b>pass</b> 38:9 <b>path</b> 186:9 <b>paul</b> 4:6 6:19 9:16 <b>pay</b> 37:16 38:16 38:23 41:22 42:18 44:9 45:12,13,15 45:16 48:22 50:11 50:12 60:8,11,20 60:22 61:6 72:13 74:3 83:7 87:20 88:16,17 89:14 96:2 105:4,7 109:25 135:10,12 136:1 137:4,6 180:23 <b>payable</b> 37:8,10 37:17 38:18 40:3 41:15 44:8 62:19 63:2,4,18 65:5 <b>payables</b> 30:10 36:14 39:5,7 40:5 50:12 63:20 <b>paying</b> 82:11 128:4 151:5 <b>payment</b> 60:3 82:5 104:24	105:10,11 136:15 158:7 177:25 178:10 <b>payments</b> 89:24 125:23 178:10 <b>pbgc</b> 18:24,25 19:10,15,23 20:10 20:11,18 27:7 28:3 55:25 56:2,8 56:16,25 57:3 58:15 61:23 62:1 66:2,4,6,13,18 67:23,23 68:2,14 68:24 69:4 70:3 78:9 79:15,18,20 79:23 80:1,8,21 94:22,25 95:5,6,8 95:10,15,17,17,20 96:15,22 101:2 102:18 104:2,6 106:6 107:13 176:11,15 <b>pbgc's</b> 56:16 57:11 68:18,20 176:17 <b>pbgc's</b> 96:23 104:9,14,18 <b>pearl</b> 4:16 10:14 10:17,23 11:6,20 12:4 <b>pearl's</b> 11:17 <b>penalized</b> 141:12 <b>penalty</b> 39:10 155:20,24 <b>pending</b> 115:16 115:18 123:19 149:21 171:10,17 171:24 <b>pension</b> 5:9 67:19 68:10 <b>people</b> 28:17 42:17 53:25 77:25 84:10 119:15
<b>p</b>			
<b>p</b> 3:1,1 10:1 <b>page</b> 20:6 24:4,13 24:14,17 26:7,8,9 28:13,23 29:22 30:17 31:7,7 32:5 32:19 33:6,24 34:8 35:1 36:10 36:12 37:12 49:20 51:5,6,20 64:9 65:24 93:2 94:4,5 100:8,8 138:7 139:15,16 140:14 142:4 147:5 156:1 <b>pages</b> 26:20 64:10 <b>paid</b> 13:22 41:12 47:12,15 48:23 49:1 59:24 60:3 60:17 73:19,21 74:5,10 88:8 89:1 105:20 109:7 128:8 137:8 142:24 144:25 150:8 156:2,3,4 159:16,17 162:2,3 162:23 165:5 179:24 <b>paragraph</b> 15:9 15:12 19:12 23:12 24:16,21 26:9,20 115:25 128:1			

145:4,6 165:24 <b>peopleready</b> 171:9 <b>percent</b> 13:6,22 17:22 31:6,10 44:4,5,5,5 51:16 51:22 52:1,6,21 52:22 53:3,18,20 53:22 54:3,4,6,8 54:20,23 55:3 59:12 64:24 77:13 77:15,15 82:19 84:22,23,25 85:1 85:21 86:4,5,6,7,8 86:11,21 87:5,6,9 90:14,15 99:11 100:19 162:14 164:12 165:12 181:5,7 <b>percentage</b> 57:25 102:15 <b>percentages</b> 53:13 83:3 87:9 <b>perfect</b> 131:2 187:14 <b>perform</b> 35:14 158:23 <b>performed</b> 28:24 <b>performing</b> 163:25 <b>period</b> 21:17 22:8 29:24 35:25 38:2 62:7,7 99:13 103:17,18 109:21 112:16 116:19,23 117:20 118:19,21 124:22 127:7 128:3,18 162:16 179:1 <b>periodic</b> 40:16 <b>perjury</b> 39:10 <b>permitted</b> 110:18	<b>personal</b> 173:22 <b>perspective</b> 30:5 <b>pertain</b> 77:2 166:24 <b>pertained</b> 137:3 <b>pertaining</b> 93:6 100:21 <b>petition</b> 29:19,24 31:6,11,16,19 32:13 34:5,10,15 34:19 56:13 62:6 76:11 99:9 103:17 <b>phil</b> 70:8 152:2 <b>philip</b> 3:8 5:21 145:21 <b>phone</b> 75:4 88:23 167:2,6 172:13 175:16 <b>phrase</b> 51:8 <b>phrased</b> 92:8 99:24 154:19 <b>phrases</b> 99:24 <b>pick</b> 10:7 60:10 <b>pickering</b> 5:15 145:22 <b>picking</b> 60:23 <b>piece</b> 107:24 <b>pipe</b> 135:11 <b>pivot</b> 69:4 <b>place</b> 12:2 58:4 110:16 131:15 132:18 167:25 <b>placement</b> 177:2 <b>places</b> 71:5 126:9 <b>plain</b> 122:2 159:4 175:15 <b>plains</b> 1:14 <b>plaintiff</b> 57:10 167:17 <b>plaintiffs</b> 149:13 <b>plan</b> 2:3 11:9 13:22 18:8,11,12 18:13 19:4,7,10	19:11,17 20:5,9 21:11,15,16 22:5 22:6,19 23:7 27:9 50:2 52:4,18,21 53:11 55:21 56:1 56:7 57:7,18,20 57:21,22,24,24 58:20,21,24 59:13 59:16,16,18,22 60:7,20 61:9,10 61:10 65:18,20,20 65:23,25 66:1,2,3 66:6,8 68:23 69:5 69:7 70:21 75:13 75:15 76:6,21 79:16,23 80:9,11 81:1,2,4,7,8,10,13 81:23,24 83:4,5 83:18,18 85:3,20 85:24 86:3,20 87:7 88:9 89:13 91:4,5 95:3,4,4 96:25 101:10,12 101:16 102:1,9 103:1 104:8,17,23 105:7 107:4,7,7,8 107:11 109:20 110:5,10,12,21 111:2 113:5,17 114:12,17 115:1 116:8,17,24 117:1 117:7,13 120:11 120:11 121:10,23 122:2,24 123:11 123:19 124:8 125:18 126:10,22 128:16 129:21,22 129:25 131:5,9,19 132:11,14,21,21 132:25 133:7,12 133:13,13 134:2,5 134:5,13,21,22,25 135:1,2,2,3,13,20	135:21,22 136:19 137:22,23,24 138:2,5,22 140:2 140:24 141:6,22 143:3,6 145:11 155:8 156:1 160:10,10 163:3 165:2 166:16 167:13,15 168:4,4 168:14 169:4,17 169:20 170:11 171:16,20 172:1 173:1,13 174:21 174:24 176:10,11 176:18 177:6,11 177:14,17,19,21 177:23,24,25,25 178:6,7,10,17,21 179:20 181:23,25 183:3,4 184:7,8,9 184:9,17,18,21,22 185:7 186:25 <b>plan's</b> 175:17 <b>planned</b> 18:18 <b>planning</b> 27:13 <b>plans</b> 81:18 178:4 <b>play</b> 67:8 71:12 118:6 <b>playing</b> 131:21 <b>plays</b> 75:6,11 <b>plaza</b> 5:3 <b>please</b> 23:19 <b>pledger</b> 66:17 <b>plenty</b> 145:4 <b>plucking</b> 159:18 <b>plus</b> 33:3 53:20 77:5 155:24 167:20 168:8 181:15 <b>pm</b> 1:17 188:2 <b>podium</b> 131:2 <b>point</b> 16:7 32:6,7 32:25 36:21 45:17
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[point - priority]

Page 33

46:16,16 47:5 50:24 54:16 57:3 57:16,17 59:1,8 59:15 61:18 62:16 62:21 71:17 72:23 72:24 74:16 79:15 82:14 83:15,17 93:3 106:20 108:22 109:17 118:20 120:14,23 121:3 122:19,21 123:2,2 124:15 128:7 130:2,4,17 130:25 131:4,16 132:7 139:10,25 147:5 148:20 149:25 153:15 154:16 155:4 161:7,22 169:15 170:10 174:13 175:23 180:19 185:24 186:1 <b>pointed</b> 36:6 <b>pointing</b> 76:19 <b>points</b> 59:9 70:10 76:3 83:14 87:10 107:2 109:11 115:6 123:17 130:1 148:21 153:7 172:8 <b>policy</b> 149:18 150:8,9,20,21,21 150:21 151:8 <b>pool</b> 62:10,12 63:17 91:15 <b>poor</b> 181:12 <b>portion</b> 42:5 152:19 159:21,24 159:25 <b>position</b> 38:20 65:17 89:13 95:25 96:18 103:20 104:18 118:19	119:3 136:20 147:25 148:2 152:10 176:17 186:9 <b>positioning</b> 186:6 <b>positions</b> 103:12 <b>positive</b> 43:25 102:3 <b>possession</b> 110:12 110:16 123:20,24 124:8 128:19 130:4 178:7 <b>possibility</b> 91:25 95:2 97:6 <b>possible</b> 64:19 68:25 <b>post</b> 15:19 16:24 29:19,24 31:6,11 31:16,18 34:5,10 34:15,19 56:13 62:6 76:11 99:9 103:17 112:16 116:13,23 117:19 118:18 119:6 120:8,15,18 125:1 132:24 145:17 <b>posted</b> 168:22 <b>posting</b> 115:16 <b>posture</b> 123:10 <b>pot</b> 42:3 44:9,13 46:21,25,25 47:3 47:10,18 49:2,20 57:24 58:6 72:19 83:5,18,19 103:8 132:25 <b>potential</b> 10:23 12:15 20:12,19 21:1 29:3,16 60:13,14 112:13 113:3 179:9 <b>potentially</b> 56:13 60:15 109:4 112:18 119:22	126:19 127:10 131:11,12 179:11 179:19 <b>power</b> 66:12 91:24 102:6 104:10 <b>powers</b> 91:6 <b>practical</b> 92:21 139:4 <b>pre</b> 54:19 68:1 100:11 112:16 116:19 118:20,24 119:2 121:6,18,20 128:3 <b>precedent</b> 183:18 <b>preference</b> 10:23 11:18 12:3,10 16:23,25 160:22 161:20,23 165:10 165:16,18 179:1,3 <b>preferences</b> 64:1 <b>pregnant</b> 153:16 <b>prejudice</b> 92:18 102:9 111:10 113:3 129:23 <b>prejudiced</b> 102:8 144:1 <b>preliminary</b> 17:19 18:3 <b>premature</b> 113:4 <b>premised</b> 79:16 <b>premiums</b> 65:5 <b>prepare</b> 35:17 55:1 <b>prepared</b> 51:2,10 51:14 67:13 73:17 73:18 87:20 96:24 157:1 176:9 <b>preparing</b> 165:16 <b>prepetition</b> 34:7 34:12,18,20 35:5 35:6,10,15,24 49:23 50:5 103:18	<b>preponderance</b> 177:16 <b>present</b> 7:17 64:14 <b>presented</b> 168:2 <b>presents</b> 65:1 <b>presumes</b> 44:17 120:13 <b>presuming</b> 46:22 <b>pretty</b> 36:5 82:7 145:11 165:1 <b>prevail</b> 131:23,24 131:25 132:2 136:16 <b>prevails</b> 136:16 <b>prevalent</b> 64:6 <b>previously</b> 34:9 42:4 80:14 93:15 93:24 168:2 180:1 183:17 184:15,16 <b>price</b> 7:1 148:10 <b>primarily</b> 24:18 35:13 186:1 <b>primary</b> 64:22 76:9 92:8 149:25 <b>principal</b> 92:24 <b>principally</b> 26:11 <b>principle</b> 98:2 183:1 <b>principles</b> 33:18 182:3,4 184:3 186:25 <b>prior</b> 15:18,19 35:1,3 67:22 140:19,23 152:22 157:20 174:18 185:11 <b>priority</b> 18:25 56:3,8 98:4 114:19 131:12,13 131:21 132:5,6 135:25 136:18 137:6 178:11,12
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<b>pro</b> 49:11 57:25 94:20 155:8 163:12 167:14 168:5	180:7	143:20 166:8	<b>provided</b> 19:1,17 26:11 33:21,25 41:6,8 116:7 121:24 142:7 158:23 160:13 177:1 184:21
<b>probably</b> 99:14 110:1 119:23 131:24 139:5 145:16 157:3 160:18 161:12,20 162:7,8 163:7 165:13	<b>professionals</b> 101:4 108:2 112:19,21 118:6 118:13,14 128:5,8 140:11 158:8,20 159:18 162:2 163:10 177:4	<b>property</b> 15:3 40:17 111:16,16 111:19 115:19 116:6,21 118:21 120:7 121:8 130:9 131:10 162:22 184:8	<b>provides</b> 79:23 81:24 85:20,24 89:17 102:10 116:24 121:24 149:12 177:14,25
<b>problem</b> 21:25 22:24 23:8 27:6 56:14 59:14 60:12 68:24 72:8 78:7 78:13 99:17 113:4 115:22 133:13 135:1,15,24 140:19 155:2	<b>program</b> 11:1,7 12:22 13:3,16 116:11 153:20 154:13 162:15 180:8 183:19 186:19	<b>proponent</b> 177:14 <b>proposal</b> 91:4 <b>proposed</b> 14:1 15:13 16:9,10,17 92:16 93:4,11 94:19,24 95:1 97:13 110:6,23 111:14 113:10 114:3,4 124:25 153:9 154:23,23 171:20 176:18,19 177:20 178:4	<b>providing</b> 21:3 26:13
<b>problematic</b> 32:1 187:20	<b>progress</b> 6:3	<b>proposing</b> 113:24 178:5	<b>provision</b> 60:20 61:7 88:13 104:22 113:6 117:15 124:17 125:1,18 126:9,22 128:2 134:23,25 135:2 143:14,19 145:11 155:5 156:2 173:1 183:17 184:25,25 185:1
<b>problems</b> 79:14	<b>prohibitive</b> 100:4	<b>proposition</b> 185:10	<b>provisions</b> 105:1 124:12 130:10 138:1 144:1 160:8 176:12 177:16
<b>procedural</b> 123:10	<b>prohibitively</b> 103:10,13,19	<b>prosecute</b> 52:9	
<b>procedures</b> 112:22 121:12	<b>project</b> 178:25	<b>prospective</b> 147:16,17	
<b>proceed</b> 16:6 169:8 185:21	<b>projected</b> 85:15 87:3 90:10 102:17 161:15 178:8,11	<b>protect</b> 102:23	<b>psychological</b> 119:14,16 121:14
<b>proceeding</b> 172:12 179:10	<b>projection</b> 178:13	<b>protected</b> 58:10	<b>public</b> 18:4 26:7 26:16 27:4,21 33:14 74:12
<b>proceedings</b> 188:1 189:4	<b>projections</b> 160:13,15,16 178:18,19	<b>protecting</b> 173:11	<b>pull</b> 63:16 64:18
<b>proceeds</b> 110:17 132:4 136:17 141:7 142:9,14 147:8	<b>prolonged</b> 109:21 126:19	<b>protection</b> 158:24 159:6 170:22	<b>pulling</b> 113:6
<b>process</b> 22:12 30:18,21 99:12 160:24	<b>prominently</b> 96:12	<b>protective</b> 113:14	<b>purcell</b> 6:4
<b>product</b> 40:24 97:20	<b>promptly</b> 178:21 180:13	<b>protracted</b> 97:7	<b>purchase</b> 25:4,6 <b>purchased</b> 24:22 25:5,19
<b>professional</b> 156:18,22 160:9	<b>prong</b> 27:17 64:5 99:19,21	<b>prove</b> 64:14	<b>purchasers</b> 157:5
	<b>prongs</b> 23:24 98:12	<b>provide</b> 15:17,20 19:4 20:1 21:24 88:10 117:1 132:11,12 155:5 160:8 171:1 177:8 180:10 182:13 185:25	<b>purported</b> 19:7 <b>purports</b> 133:15 <b>purpose</b> 53:7 57:2 87:17 119:9
	<b>proofs</b> 25:16,17 25:23		
	<b>proper</b> 33:8 70:20 71:11 180:13 181:22,23		
	<b>properly</b> 32:21 96:21 104:20		



<p><b>purposed</b> 52:22</p> <p><b>purposes</b> 63:22 123:11 135:23 141:3,4,10,23 176:20 180:17 181:20</p> <p><b>pursuant</b> 19:9 25:4 68:20</p> <p><b>pursue</b> 66:13 95:12,23 98:9 108:24 111:11 118:4 132:22 135:11 173:5</p> <p><b>pursued</b> 104:8</p> <p><b>pursuing</b> 95:19</p> <p><b>push</b> 32:2</p> <p><b>pushing</b> 58:19</p> <p><b>put</b> 15:2,17 39:25 41:3 42:14,16 43:6 46:17 48:18 49:7 55:8 60:20 71:22 72:10,14,19 125:7,11 131:5 133:12 142:22 154:8 158:6 159:12 160:5 172:11 173:17</p> <p><b>puts</b> 44:4 71:18 162:14,15</p> <p><b>putting</b> 47:24 52:3 71:20 85:21</p>	<p>26:10,15 28:23 29:5,7,22 30:2,11 30:21 31:14,17 32:5,12,15,19,20 32:25 33:2,6,11 33:13,19,24 34:2 34:9,14 35:1,5,12 35:17,19,21,23 36:2,8,19 37:18 37:19 38:5,19,22 38:25 39:2,9,16 39:19,22,25 40:4 40:9,10,10,12,15 40:19,21 41:2,11 50:4,14,16,18 51:6,10,21,21 52:1,7,10,13 78:24 92:24 105:16 109:5,18 157:17 162:17</p> <p><b>questioned</b> 185:21</p> <p><b>questions</b> 23:17 34:21 35:2,4,7,9 35:12,13,24 66:11 76:8 105:14</p> <p><b>quick</b> 167:17</p> <p><b>quicker</b> 47:6</p> <p><b>quickly</b> 69:13 89:21 165:9 167:1 187:5,8</p> <p><b>quietly</b> 75:14</p> <p><b>quite</b> 61:12 111:18 114:23 124:1 143:12 183:13</p> <p><b>quo</b> 110:13</p> <p><b>quote</b> 41:6 147:4 147:7,8,12,13 177:16</p> <p><b>quoted</b> 92:22 142:5</p>	<p><b>r</b></p> <p><b>r</b> 1:21 3:1,17 4:6 4:13 10:1 183:18 189:1</p> <p><b>rachel</b> 8:7</p> <p><b>rai</b> 1:25</p> <p><b>raise</b> 96:9 105:17 107:20 141:24 146:18 175:23</p> <p><b>raised</b> 12:24 14:8 18:10 56:6 57:8 59:9 87:11 107:18 108:17 115:13 129:12 157:11 166:4 170:12 186:5</p> <p><b>raises</b> 98:12</p> <p><b>ran</b> 84:1</p> <p><b>randomly</b> 25:15</p> <p><b>range</b> 64:15 109:16 160:21 161:21</p> <p><b>ranges</b> 161:15</p> <p><b>rata</b> 49:11 57:25 163:12 167:14 168:5</p> <p><b>rational</b> 96:19</p> <p><b>ray</b> 61:19</p> <p><b>raynor</b> 5:13 67:18 67:19 68:3,8 69:2 69:6,11</p> <p><b>rdd</b> 1:3</p> <p><b>reaction</b> 183:25</p> <p><b>read</b> 31:17 42:5 116:3 119:5 139:17 140:13 141:6 142:12,18 142:18 147:6,15 169:20 173:10 187:15,17</p> <p><b>reading</b> 43:23 89:11 122:2 142:4</p>	<p><b>reads</b> 127:18</p> <p><b>ready</b> 43:12 186:2</p> <p><b>real</b> 21:25 23:7 27:13 59:1 99:17 109:24 150:25 157:17 183:10</p> <p><b>realistic</b> 165:11</p> <p><b>reality</b> 17:11 124:2</p> <p><b>realizing</b> 165:8</p> <p><b>really</b> 12:17 13:8 24:1 34:6,6 47:16 50:19 51:19 53:8 57:3,15 59:11 64:11 65:19 69:13 79:21 83:22 87:22 89:21 107:19 108:3 109:17 110:6,11 129:22 137:21 139:6 149:7 155:19 156:17 160:6 162:1,4 166:6 167:17 180:16,17 186:13 187:21</p> <p><b>reason</b> 21:21 105:15 112:17,17 112:25 114:15 119:18 120:24 126:2 128:13 159:17 182:23</p> <p><b>reasonable</b> 31:11 60:9,22 66:1 74:20 79:24 80:7 80:20 96:19 100:5 100:20 104:11,25 155:6 160:13 163:22 164:19 176:16 178:19,25 180:22,24</p> <p><b>reasonableness</b> 64:15 109:16</p>
<p><b>q</b></p> <p><b>qbe</b> 150:20,23</p> <p><b>qualified</b> 51:15,18</p> <p><b>quarropas</b> 1:13</p> <p><b>queried</b> 29:25</p> <p><b>query</b> 32:2</p> <p><b>question</b> 20:8,17 20:18,23 21:20,21 22:13,16,23 23:15 23:18,19,21 24:4 24:14,16,20,25 25:5,9,11,12</p>			

<b>reasonably</b> 78:2 80:13 100:11	41:13 50:8	<b>refers</b> 20:18 31:24 51:7	<b>release</b> 172:23 175:23,25 179:3
<b>reasons</b> 66:5 76:20 151:21 184:15	<b>recoupment</b> 170:13	<b>reflect</b> 22:8 38:19 50:9 55:10,22 84:21,22,24	184:19,19,20,25 185:1,6,8
<b>recall</b> 66:15 90:1	<b>recover</b> 53:18,20 82:24	<b>reflected</b> 50:8	<b>releases</b> 97:18 148:3 150:5,6 185:6
<b>receipts</b> 98:20	<b>recoveries</b> 49:25 55:3 87:4,5 90:2 90:11 102:16,20 147:8 148:16 165:12 176:21 178:25 179:11	<b>reflection</b> 165:3,5	<b>releasing</b> 129:6 170:1 172:9,18,24
<b>receivable</b> 37:7,7 37:10 38:18 44:11 63:1,4,18	<b>recovering</b> 173:4	<b>reflects</b> 14:1	<b>relevant</b> 22:17 122:12 130:1
<b>receivables</b> 30:10 36:15 37:16 39:4 39:7 40:5 49:9 50:9 63:20	<b>recovery</b> 13:4,17 13:20 38:17 52:20 52:22 53:22 59:12 82:20 85:10,14,21 86:3,11,21 87:6,9 90:14 95:10 102:12,24 108:12 114:20 149:5,12 152:25 162:4 181:6,7	<b>refusing</b> 80:7	<b>reliance</b> 183:5,25
<b>receive</b> 10:17 31:8 38:17 57:25 87:17 147:7 148:16 177:11	<b>redo</b> 187:19,21	<b>regard</b> 176:13 177:15	<b>reliant</b> 64:7
<b>received</b> 53:18 54:20	<b>reduce</b> 102:20 179:4	<b>regarding</b> 20:12 20:19 21:23 35:13 104:24 172:25 177:2	<b>relied</b> 37:22 183:16
<b>receiving</b> 184:8	<b>reduced</b> 10:19 102:25 103:22 186:3	<b>regardless</b> 58:20 105:8	<b>relief</b> 168:17
<b>recite</b> 10:15 14:24	<b>reduction</b> 144:3 179:3	<b>regards</b> 21:4 22:15 34:17 39:1	<b>relieve</b> 102:7
<b>recited</b> 166:15	<b>refer</b> 24:5 151:15 185:10	<b>regime</b> 132:24	<b>reluctant</b> 179:19
<b>recognized</b> 91:7	<b>reference</b> 138:7 139:10	<b>reiterate</b> 184:14	<b>rely</b> 20:22 65:15 92:10
<b>recognizes</b> 136:15	<b>referenced</b> 21:7 25:1 177:2	<b>reject</b> 55:21 167:15 172:1,3	<b>relying</b> 20:15 80:16 183:22
<b>recognizing</b> 106:9	<b>references</b> 138:8	<b>rejected</b> 101:12 114:4,6 115:4 123:25 171:16 173:25 174:3,11 174:25 175:4,18	<b>remain</b> 15:3 112:20 116:6 119:10 123:20 168:6,17 170:17
<b>reconciliation</b> 100:4	<b>referred</b> 20:4 34:21 99:22	<b>rejecting</b> 101:16 101:25 104:15	<b>remaining</b> 26:13 94:4 110:15 165:8 166:17 182:24
<b>record</b> 14:25 41:13 56:15 64:12 80:3 89:22 95:14 95:20,24 96:16 106:24 109:14 152:3 159:13 168:16 169:18 179:25 180:2 181:16 186:22 189:4	<b>referring</b> 20:14 22:14 35:23 87:8	<b>rejection</b> 174:18	<b>remains</b> 131:10 131:11
<b>recorded</b> 30:19 41:18 42:8 62:25 63:3		<b>related</b> 34:4 93:8 126:23 129:21 146:9 154:20 161:25	<b>remarks</b> 152:22
<b>records</b> 29:4,17 33:8 38:19 40:13		<b>relates</b> 59:15 139:23 173:13,14	<b>remedy</b> 92:21 102:5 145:10
		<b>relating</b> 150:5	<b>remind</b> 151:23
		<b>relative</b> 97:11	<b>reminder</b> 106:3
		<b>relatively</b> 94:3 102:16 106:9 179:1,15,17 180:4 180:22 185:14	<b>removed</b> 15:4 112:12
			<b>rendered</b> 96:13
			<b>rendering</b> 78:20
			<b>reorganization</b> 177:18,20

[repeated - right]

Page 37

<b>repeated</b> 21:19	<b>requisite</b> 95:15	<b>responses</b> 30:4	<b>revised</b> 14:3
<b>rephrase</b> 21:18,19	<b>res</b> 184:24	<b>responsibility</b>	146:20
23:19 38:25 40:8	<b>reserve</b> 115:13	41:25	<b>ri</b> 9:2
<b>replacement</b>	116:5,9 120:20	<b>restatement</b>	<b>rick</b> 8:4
170:25 171:2	121:23 122:3,20	182:16 183:17	<b>rid</b> 155:24
<b>reply</b> 93:20,25	123:1,8 131:17	<b>restatements</b>	<b>rides</b> 174:23
102:13 185:11	<b>reserves</b> 121:24	53:24	<b>ridiculously</b> 89:2
<b>report</b> 10:13	<b>resolution</b> 10:9	<b>restivo</b> 23:24 64:5	<b>riffkin</b> 9:15
157:8	12:11 102:19	78:15 91:8 92:7	<b>right</b> 14:17 16:2,8
<b>reported</b> 31:4	169:2 180:8,22	92:13 98:12 99:19	24:23 28:23 31:16
93:19	186:2	<b>restructuring</b>	31:19 33:20 37:21
<b>reporting</b> 15:18	<b>resolve</b> 168:19	186:13	38:24 39:16 42:25
27:13 128:21	170:22 179:19	<b>result</b> 52:17 92:15	43:17 44:1,24
<b>represent</b> 108:4	<b>resolved</b> 11:16	145:9 147:18	48:1,16 51:5
145:22 146:8	12:1 59:14 94:2	168:14	57:23 58:9,21
<b>representation</b>	108:3 166:2,4,16	<b>results</b> 30:11	68:7 69:12,20
79:21	169:11 171:11	104:15	70:7 75:10,22
<b>represented</b> 96:23	172:8 176:3,4	<b>retail</b> 40:22	80:10,12,18 81:21
179:13	<b>respect</b> 11:25	<b>retain</b> 13:21	86:18 87:13,15,18
<b>representing</b> 54:1	12:22,24 16:22	<b>retained</b> 12:12	88:4,25 89:18
<b>reprise</b> 142:20	19:23 27:2,17,18	<b>retainer</b> 108:1	90:12,19 96:24
<b>republic</b> 78:18	28:8 34:15 35:5	<b>return</b> 60:1 179:3	104:18 106:19
91:18 92:19 93:15	35:24 36:3 56:17	181:3 182:9	111:20,25 112:4,7
100:6	70:11 71:11 72:23	<b>returns</b> 27:2,3	115:23 117:5
<b>request</b> 19:25	101:7 103:17	<b>reversal</b> 133:23	118:3,23,24,25
32:10 123:8	104:11,20 125:1	133:25 134:13	123:4 124:3,20,24
<b>requested</b> 15:15	132:21 135:24	<b>reversals</b> 132:15	127:17 128:12
123:17	137:24 139:20	134:8	129:1,6,7,16,25
<b>require</b> 18:10	143:11 149:3	<b>reverse</b> 132:16	132:15 133:20
103:4 177:22	150:1 153:7	145:10	134:4,10,15,18
<b>required</b> 27:2,3	154:17 168:25	<b>reversed</b> 120:11	135:4,21 136:15
123:2 159:8	170:13,18 174:7	120:12 141:17,20	137:5 138:12,14
<b>requirement</b>	174:10 177:9	141:21	140:9,17 141:3,11
160:10 177:6	184:24	<b>revert</b> 66:2	142:25 143:1,2,24
<b>requirements</b>	<b>respective</b> 184:1	<b>review</b> 12:6 14:5	144:13,22 145:20
18:17 33:17,20	<b>respond</b> 35:9	32:4 62:6,8 76:3	145:25 146:21
123:21 158:22	83:14 150:11	165:25 179:7	147:10 148:4,18
184:10	<b>responded</b> 35:2	180:13 181:14	149:20 150:12,13
<b>requires</b> 19:21	<b>responding</b> 34:21	<b>reviewed</b> 31:9	151:4,9,10 152:14
55:19 95:4 177:24	35:4,7	178:15	152:24 153:4
180:20	<b>response</b> 61:18	<b>reviewing</b> 29:4,17	154:5,12,14,15
<b>requiring</b> 99:22	156:17	97:17,25	155:4,21 156:13
			156:22 159:24

[right - secondly]

Page 38

160:25 163:8,21 163:24 165:5,21 169:2,16 170:8,19 171:5,15,22,25 172:6,19,25 173:10,12,15 174:9,12,13,14,15 174:20 175:2,6,11 175:13,20 176:6 187:2,6,10,12 <b>rights</b> 13:21 58:8 68:15 104:10,19 110:16 111:10,23 112:18 113:19 123:21 125:12 131:11 135:20 142:24 156:8 158:4 169:17 176:17,23 <b>rise</b> 110:5 149:7 <b>rising</b> 147:1 <b>risk</b> 11:18 14:16 51:22 52:6,11,14 147:4 162:14,15 181:16 <b>risks</b> 100:21 151:24 <b>road</b> 189:21 <b>robert</b> 1:22 9:3,13 <b>robust</b> 32:8 <b>rocco</b> 7:25 170:4 <b>roebuck</b> 24:19,22 26:12 48:19 63:12 71:1 72:13,13 <b>rogers</b> 9:14 <b>rohn</b> 7:19 <b>role</b> 75:5 <b>rolling</b> 79:3 <b>rollout</b> 19:13 <b>ronald</b> 7:23 9:12 <b>room</b> 1:13 <b>rosa</b> 166:5,9 172:6,9,10,13,15	172:17 173:3,18 <b>rose</b> 151:21 <b>roughly</b> 186:17 <b>round</b> 19:13 <b>routine</b> 155:7,18 <b>rubric</b> 121:9 <b>rule</b> 91:3 93:7 98:4 164:10 182:17 <b>ruled</b> 115:14 133:5 170:10,19 175:12 176:11 184:12,15,16 187:11 <b>rules</b> 27:3 87:16 123:22 186:25 <b>ruling</b> 93:24 106:8 143:11 154:17 158:10 164:6,7 174:16 183:20 184:14 <b>rulings</b> 120:10 184:1 185:12,12 <b>run</b> 63:13 78:16 83:2 <b>rung</b> 109:16 <b>running</b> 40:22 53:25	<b>sara</b> 3:9 <b>saracheck</b> 6:12 <b>sarachek</b> 6:1 156:11,11,14 157:12 158:11 <b>satisfied</b> 26:21 57:20 <b>satisfies</b> 184:9 <b>satisfy</b> 18:17 114:20 <b>satisfying</b> 91:14 180:3 <b>saw</b> 16:9 52:4 129:24 <b>saying</b> 32:18 33:3 33:4 38:7 39:11 43:12 46:20 72:8 82:10 86:19 87:1 108:23,25 109:1 114:24 118:21 124:2 132:17,20 133:7,11 141:1 144:15 145:7 153:10 160:19 164:21 <b>says</b> 20:8,25 23:10 26:10,19 32:7 36:12 49:21 59:17 59:18,25 63:9 115:25 116:4 117:7 126:5 130:8 135:2,3,22 136:24 137:7 138:17 139:14 140:12 142:1,5,13,20 145:10 149:1,10 150:1,7,9,19 153:22,23 174:24 <b>schael</b> 8:6 <b>schedule</b> 37:3,4 <b>schedules</b> 37:3 39:3,9,13 55:1	<b>schein</b> 7:7 <b>scheuer</b> 8:3 <b>schrock</b> 61:19,20 63:15 66:15 67:3 67:7,14,16 69:3 70:10,16,22 83:15 89:21 107:8 115:24 116:3 125:7,9,11,14,16 158:15,18 159:23 160:2,11,25 161:5 161:8,10 162:11 163:2,8,11,13,17 163:21,24 164:2,5 164:8,11,17,20,23 165:15 176:4 186:11 187:4 <b>schrock's</b> 76:3 <b>schwartzberg</b> 9:16 <b>sean</b> 69:13 <b>sears</b> 1:7 2:3 10:2 24:6,19,19,21,23 26:11,12 28:15,18 29:1,11,14,20,23 30:13 31:9 41:16 44:4,5,5 45:3 48:19 49:15 63:11 63:12 71:1,1,5 72:4 150:7 159:3 167:18,19,23,25 <b>sec</b> 27:3 28:1 <b>second</b> 2:2 13:15 13:19 24:17 28:21 32:7 78:14 91:7,9 92:4 97:4 99:19 119:21 129:24 130:23 150:20 153:15 174:4 181:4,17 182:16 182:21 <b>secondly</b> 18:3 54:10 180:13
	<b>s</b>		
	<b>s</b> 3:1 10:1 <b>s.d.n.y.</b> 91:19,20 92:19 175:14 182:7 <b>sale</b> 59:23 60:7 68:12 69:20 144:13 159:22 <b>salt</b> 144:15 <b>sam</b> 8:22 <b>samil</b> 6:3 <b>sandwich</b> 180:15 <b>santa</b> 166:5,9 172:6,9,9,13,15 172:17 173:2,18		

[secret - showed]

Page 39

<b>secret</b> 27:15	<b>send</b> 14:24 169:19	112:9 133:16	150:4 161:17
<b>section</b> 59:10	173:17	142:6,22 167:14	166:7 179:17
65:24 96:5 101:12	<b>sending</b> 70:24	<b>setoff</b> 170:13	180:12,14,15,18
104:6,8 167:14	71:1	<b>sets</b> 114:2 182:16	180:20 181:3,10
173:1 175:15	<b>sends</b> 71:24	<b>setting</b> 113:3	183:8 187:19,21
177:9,22 180:3	<b>senior</b> 17:22	120:20 122:20	<b>settlements</b> 19:20
181:20,24 182:16	54:21	131:10 147:24	93:22 106:18
184:22	<b>sense</b> 29:8 30:11	<b>settle</b> 19:7,10,19	153:10 179:2
<b>secured</b> 17:22	44:21 47:11 77:6	37:14 38:10,12	181:20
131:11 132:3	84:2 89:16 109:24	40:16 49:19 77:24	<b>settlement's</b> 97:6
157:20 178:12	157:24 161:13	180:10 185:16	<b>settling</b> 100:17
<b>see</b> 17:2 22:9	165:15	<b>settled</b> 10:13	<b>seyfarth</b> 7:9
24:20 26:10,15	<b>sent</b> 187:12,15	37:13 68:19 70:20	<b>shanghai</b> 6:4
36:9,17 45:13,24	<b>sentence</b> 24:17	94:8 157:5 166:24	<b>share</b> 167:14
46:20 50:2 51:8	36:11,18,19	179:14	168:5
57:1 58:8 60:12	123:18 140:13	<b>settlement</b> 13:1	<b>sharnah</b> 8:12
60:24 94:16 100:6	148:25 152:21	18:7,11,13,18,24	<b>sharon</b> 9:10 167:5
112:10 115:3	<b>sentences</b> 139:18	19:10,14,14,21	<b>shaw</b> 7:9
117:8 120:5 134:7	<b>separate</b> 34:17	20:11,11,19,25	<b>sheet</b> 30:17,19,20
137:17,20 145:12	38:3 49:18 50:14	21:4 38:13 56:1,2	30:23 31:4 35:11
146:22 157:13	81:10 92:10 98:15	57:22 58:11,13,22	94:25 96:9 133:1
161:16 165:1	101:24 137:16	58:24 59:7 61:11	179:22,22
175:13	148:7,8 160:9	61:23 64:15 65:25	<b>sheets</b> 80:2 103:24
<b>seek</b> 19:2 116:17	172:3	66:7,10 68:2,20	<b>shell</b> 107:15,17,22
131:17 141:1	<b>separately</b> 46:15	68:23 70:21 76:22	<b>shelley</b> 9:11
167:21 168:17	80:8 88:5 92:11	77:21,22 78:5,9	<b>shepherding</b>
<b>seeking</b> 116:16	104:6,12 105:4	79:14,15,20 80:2	156:15
185:24	149:19,19 176:16	80:8 82:18 83:11	<b>shift</b> 57:5
<b>seemingly</b> 58:15	<b>september</b> 31:24	85:13,15 90:17	<b>shock</b> 165:18
154:20	183:12	93:5,9,11,16 94:7	<b>short</b> 61:8
<b>seen</b> 16:8 126:16	<b>serious</b> 96:9	94:9,11,12,15,16	<b>shorter</b> 99:15
127:12 187:14	156:21 157:6	94:18,19,22,24	<b>shortfall</b> 160:17
<b>segregated</b> 15:2	<b>seritage</b> 150:5	95:7,8 96:15,17	161:15 178:8,20
111:6,22 112:9	<b>serve</b> 108:1	96:20,22,22 97:3	179:5
140:5 177:3	<b>serves</b> 66:17	97:13,14,17,19	<b>shouldn't</b> 119:8
<b>segregation</b> 14:21	<b>service</b> 60:3,4	98:1,1 100:6,23	125:23 132:17
111:8,22 112:19	175:22	101:5,18 102:18	<b>should've</b> 107:18
119:10 121:16	<b>services</b> 7:3 25:5	103:22 104:2	<b>show</b> 26:21 29:20
139:23	25:8 28:7 63:12	107:13,14 108:2,6	37:3 42:13 43:23
<b>select</b> 67:24	73:20 158:23	108:11,13 111:2	47:16 177:15,15
<b>self</b> 136:19	163:25	113:8 117:16	178:20
<b>sell</b> 28:7	<b>set</b> 35:18 53:15	121:12 128:22	<b>showed</b> 120:25
	93:11 101:13	138:10 145:4	

[showing - start]

Page 40

<b>showing</b> 51:3	138:6,12,14,19	<b>solvent</b> 23:2 45:6	<b>sparingly</b> 91:24
<b>shows</b> 18:22 43:24	139:11,15 140:13	45:7 81:25 98:13	<b>speak</b> 67:17 85:25
51:11 56:16 71:15	140:14 141:5,12	100:16 102:11,21	167:2 182:20
<b>side</b> 82:10 83:23	151:18 153:1,3,17	148:7	183:3
152:4 179:21,22	154:5,7,12,15	<b>soma</b> 7:20	<b>speaking</b> 17:8
<b>sides</b> 105:2 180:25	170:23 171:1,12	<b>somebody</b> 72:4	18:4 101:22 170:7
<b>signed</b> 12:8 80:2	171:19,25 172:2,5	77:11	<b>special</b> 109:8
170:7	173:12,15,19	<b>somewhat</b> 11:24	142:22
<b>significant</b> 24:22	174:4,6,9,14,20	104:23	<b>specific</b> 20:1,22
49:22 52:23 60:12	174:24 175:2,5,7	<b>sonia</b> 9:18	25:9,17 60:23
113:9 130:7 147:8	175:11,20	<b>sontchi</b> 160:6	61:17 98:18
157:15,16,23	<b>single</b> 28:5 40:24	<b>sonya</b> 2:25 189:3	124:12 138:7
<b>silence</b> 182:18,20	49:13 91:13 92:10	189:8	159:5 181:23
182:21 183:23	130:11 144:9	<b>soon</b> 16:21 187:17	<b>specifically</b> 20:14
<b>silent</b> 182:24	<b>singled</b> 159:18	<b>sophisticated</b>	20:25 24:2,7
<b>similar</b> 28:24	<b>sink</b> 78:7	179:14	25:10,18,20,25
34:19 124:25	<b>sit</b> 75:14 157:1	<b>sorry</b> 17:13 29:6	32:25 41:17
183:19	<b>sitting</b> 22:3 135:9	30:24 31:16 34:3	154:20
<b>similarly</b> 128:21	137:5 145:13	74:16 84:24 85:6	<b>specified</b> 177:9
169:7	164:13	86:2,11 100:8	<b>specify</b> 118:23
<b>simple</b> 38:14 47:9	<b>situation</b> 48:7	130:15 132:8	<b>spend</b> 54:12,15
98:20 107:7,11	77:4 80:18	146:3 160:15	118:13
123:18 124:9	<b>size</b> 28:18,20,22	164:13 187:5,7,7	<b>spending</b> 77:5,18
180:22	28:25 104:14	<b>sort</b> 11:25 12:15	82:16
<b>simplest</b> 37:15	<b>skewed</b> 104:13	13:1,8 14:9 15:4,5	<b>spent</b> 75:14 89:11
<b>simply</b> 32:1 34:20	<b>slightly</b> 99:13	15:17 16:24 28:14	99:8 118:11,14
38:22 40:5,19	<b>slim</b> 55:7	43:13 49:15 77:21	139:5,8 156:19
55:18 97:22	<b>slippery</b> 60:19	120:13 165:14	157:7 160:9
100:14 103:21	<b>slope</b> 60:19	<b>sorted</b> 49:16	<b>spinner</b> 9:12
110:13 123:10,17	<b>small</b> 87:3,3	<b>sorts</b> 53:7 116:16	<b>spoke</b> 157:2
126:12 147:23	179:15	120:15 137:19	165:23,24
149:1 151:20	<b>smaller</b> 165:2	160:3	<b>spot</b> 12:21
164:18 173:17	<b>smith</b> 7:24	<b>sought</b> 116:16	<b>staff</b> 165:17
177:24 181:7	<b>sold</b> 24:23 40:23	187:21	<b>stand</b> 106:24
185:10	<b>sole</b> 142:10,16	<b>sounds</b> 63:15	107:3 119:23
<b>singh</b> 3:19 9:8	<b>solely</b> 92:1 147:1	112:10	159:14,14
10:4,5,12 11:6,15	177:3	<b>source</b> 149:12	<b>standalone</b> 22:25
11:19 12:13,20	<b>solutions</b> 6:4	<b>sources</b> 102:24,25	<b>standard</b> 137:16
14:17 15:9,12,15	183:15 189:20	142:10,15 178:13	<b>standards</b> 81:19
15:23 16:1,3,11	<b>solve</b> 72:7 159:8	178:24	<b>standing</b> 109:10
16:13,15 17:6	<b>solvency</b> 23:8	<b>south</b> 5:10	<b>star</b> 7:2
125:5,17,21	100:13	<b>southern</b> 1:2	<b>start</b> 60:10,19,23
127:19 128:24			110:25 111:4,5

[start - supplemental]

Page 41

<p>124:12 166:15  <b>started</b> 16:5 18:6  166:2  <b>starting</b> 31:22  32:5 34:25 166:14  <b>starts</b> 36:12  <b>state</b> 106:23  149:21,22 160:21  165:17  <b>stated</b> 31:14 95:20  108:16 182:22  <b>statement</b> 20:4,9  31:21 32:24 33:15  36:4,11 49:21  50:3 51:7 56:7  59:22 60:7 74:23  85:11 105:18  121:15 124:9  130:5 138:4,17,23  138:24 139:10,16  147:22,23 152:15  184:17  <b>statements</b> 26:25  27:1,5,21 33:17  33:20,23 39:10  55:1  <b>states</b> 1:1,12  184:13  <b>stating</b> 123:18  <b>status</b> 110:13  122:17 130:3,4  169:5  <b>statutory</b> 136:18  184:23  <b>stay</b> 79:22 115:16  116:14,16,17  120:14 122:7,8  131:18 141:1,20  145:16 168:2,8,9  168:11,13,16,18  169:9,21  <b>staying</b> 117:18</p>	<p><b>stays</b> 168:6  <b>stealing</b> 136:6  <b>steen</b> 5:1  <b>step</b> 12:14 112:12  <b>stepping</b> 16:20  <b>steps</b> 168:24  <b>steven</b> 8:15  <b>stipulate</b> 128:25  170:24  <b>stipulation</b> 167:24  168:19 172:11  <b>stock</b> 54:22  148:10  <b>stood</b> 156:1  <b>stop</b> 121:19 154:1  <b>store</b> 24:22  <b>stores</b> 24:23 93:18  94:17 100:7 102:2  <b>strauss</b> 3:3  <b>street</b> 1:13 4:10  5:18  <b>strict</b> 103:1  <b>strike</b> 66:5 127:22  <b>strong</b> 6:2  <b>strongly</b> 152:24  <b>structure</b> 68:8  70:23 71:5,25  72:5 110:22  <b>stuff</b> 107:16  <b>sub</b> 65:8,11 66:6  83:11 90:17  <b>subcommittee</b>  149:13  <b>subject</b> 66:1 95:17  112:5,21 113:19  116:8,10 119:12  122:1 123:21  128:5 130:9,12  131:11 141:22  171:10  <b>submission</b>  185:17</p>	<p><b>submit</b> 62:15  64:18 112:15  187:11  <b>submitted</b> 69:7  126:24  <b>subordinated</b>  89:25 90:5,7  <b>subparagraph</b>  24:18  <b>subs</b> 58:23  <b>subsequently</b>  114:14,18,21  129:23 141:16  <b>subsidiary</b> 95:12  <b>substantial</b> 20:16  52:5 178:25 179:9  179:18 186:20  <b>substantially</b>  22:22 95:8 102:19  <b>substantive</b> 19:5,7  19:11,13 20:20  21:11,15 22:6,18  23:6,9,11,14,25  25:13 27:17 44:17  45:3 46:22 51:16  52:11,14,21 53:6  53:19 54:2,7 55:7  57:5,21 58:17,20  59:7 61:10,16  63:15 64:25 70:11  70:13 76:21,21  77:24 78:5,8,13  78:19 79:16,22  83:9,21 90:18  91:1,2,10,23 92:6  92:14,23 93:4,5,6  93:8,14,17,21  94:1,7,14,19,21  95:1,3 96:21 98:7  99:18,20 100:5,18  100:20 101:5,9,20  102:4,6 103:1  104:2 106:12</p>	<p>107:13  <b>substantively</b>  19:2,8 20:13  46:22 53:21 62:14  63:21 91:5 98:10  <b>substituted</b>  167:24  <b>subtracting</b> 33:5  <b>success</b> 97:6 160:3  <b>successes</b> 119:24  <b>successful</b> 119:23  134:15,16  <b>successor</b> 177:19  <b>sue</b> 144:16  <b>sufficient</b> 102:23  109:25 180:23  181:14  <b>suggest</b> 26:4  58:22 65:10 78:3  80:5 81:12 148:12  <b>suggested</b> 126:11  158:9  <b>suggesting</b> 47:6  60:13 80:13  <b>suggests</b> 65:12  <b>suit</b> 147:24  <b>suite</b> 4:3 189:22  <b>summarize</b> 62:11  <b>summarized</b>  30:16 36:17  <b>summarizing</b> 31:1  <b>summary</b> 32:10  <b>sunny</b> 3:19 9:8  10:4  <b>super</b> 101:15  132:5 135:25  <b>supplement</b> 16:9  126:10,22 129:25  133:11,14 134:23  134:25 135:2,3  137:25 142:2,3  <b>supplemental</b>  136:7 178:16</p>
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<b>support</b> 68:25 69:7 73:18 75:15 93:21 97:13,14 101:18 105:18 178:16 186:20 <b>supported</b> 180:25 <b>supporting</b> 97:15 <b>supports</b> 11:8 62:23 <b>supposed</b> 39:1 153:18 <b>sure</b> 20:25 29:5 30:8,9 40:8 41:7 44:3 47:15 51:5 58:9,19 68:22 73:16 74:19 76:1 83:6 85:8,17 86:9 86:12,13 123:1 134:12 151:4 152:11 154:21 155:12,16 158:13 158:17 166:25 168:9 170:9 172:10 173:19 187:1 <b>surprise</b> 28:4 <b>surprised</b> 118:16 147:21 <b>surprisingly</b> 150:23 <b>suspect</b> 108:3 150:18 <b>swept</b> 98:21 <b>swing</b> 160:14,16 <b>switch</b> 22:5 95:4 <b>switching</b> 96:24 <b>system</b> 31:24 32:16,20 33:2,7 36:16 37:2,11 39:20,23 40:1,2,6 40:25 41:3,4,5,6,6 41:7,7,12,16,24 42:3,11,12 43:9	43:14 45:11 47:9 48:18,21 62:13,18 62:20 63:5,11,14 70:13,15,25 71:1 71:7,15,15,23,24 72:7 98:20 100:15 <b>systems</b> 32:7 36:13 37:24 41:17 45:18 <b>szambel</b> 8:4 <b>szydlo</b> 9:9	<b>target</b> 117:9 <b>tarter</b> 170:5 <b>tax</b> 26:25 27:2,3 27:13 178:12,12 <b>team</b> 52:8 176:2,5 <b>teaming</b> 145:24 <b>technical</b> 133:19 <b>telephonically</b> 7:17 <b>teligent</b> 182:6 183:12,15 <b>tell</b> 18:4,5 64:21 143:9,10 149:16 <b>temper</b> 60:15 <b>teresa</b> 8:16 <b>term</b> 142:8,14 179:18 180:4 <b>terms</b> 10:15 11:10 16:10 26:16 55:16 58:11 76:3 80:2 87:2 94:25 101:14 101:25 110:11 117:19 143:7 181:25 184:21 <b>test</b> 23:24 64:5 97:21 179:10 <b>testified</b> 28:10 29:22 42:4 99:10 <b>testify</b> 76:7 <b>testifying</b> 41:19 <b>testimony</b> 20:1,7 22:7 34:10 43:22 48:16 62:23 65:9 76:5 103:15 109:22 165:7 178:17 <b>thank</b> 17:6,15,17 61:14 69:12 70:6 75:23 89:19 127:23 129:4 145:14,19 151:25 155:9 158:11 161:8 164:20,22	164:24 169:22,24 173:21 186:11,11 187:2,23 <b>thanks</b> 129:16 166:11 <b>that'd</b> 154:11 <b>that's</b> 77:16,16 78:13 80:16,17 81:21 82:14,23 83:21 84:10 85:16 85:22,24 86:17 88:3 89:5,10,17 89:25 94:14 99:23 106:20 107:25 109:21 112:5 114:5,6,23,24 115:21 116:25 119:3,14,17 120:19 121:9 122:6,11 123:11 123:12 124:2,5,16 125:3,6 127:6,16 128:17 129:2 130:12 134:24 135:19,19,24 136:20 <b>thau</b> 8:20 <b>therese</b> 8:3 <b>there's</b> 77:20 84:21 111:3 112:16,17,25 113:10 114:1 115:12 116:17 117:20 118:25 122:4,7,13 124:17 125:17 126:2 127:5,22 128:1,13 128:21 130:2 132:2,25 136:4 <b>they'd</b> 81:24 82:4 135:10 <b>they'll</b> 88:16 112:20,22,25
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------



113:1 <b>they're</b> 80:6 82:11 83:6 85:12 86:6,6 87:20 88:8 89:24 90:5 109:12 110:9 112:12 113:1,16 125:23 126:25 131:10,22 <b>they've</b> 84:14,15 130:5 <b>thin</b> 100:12 <b>thing</b> 34:4 58:9 70:3 75:17 78:21 79:6 137:10 145:9 151:4 154:4 158:3 161:21 173:16 174:17 <b>things</b> 27:1,7 55:19 59:23 61:5 70:10 73:25 88:22 89:3 116:16 120:13,16 126:9 128:22 150:3 <b>think</b> 12:1,20 15:4 15:15 17:7,9 18:12 27:20 28:9 42:5 46:13 47:13 49:14 55:20,22 57:2,8,16 59:3 62:12 63:8,23 64:7 65:10,12,19 69:17 70:12 71:8 77:20 78:4 79:20 80:5 81:13,14,20 85:5 86:5,15,17 88:12 89:22 90:16 90:19 105:6,15,22 107:5 108:17 109:21 110:8,9 111:9 115:11 116:13,18 119:15 119:15,17 120:16 122:5 123:2,6,7,9	124:2 125:5,19 126:18,19 128:6 129:11,21,25 130:4 131:1,2,24 131:25 132:2,7,11 132:12,20,21,22 133:5,19,21,22 134:12 135:12 139:2,2,10,12,12 140:25,25 141:2 141:19,21 143:23 144:10,12,13 147:6,6,15 148:15 148:17,22,25 149:4,17 151:14 152:9,12,18 154:3 156:5,21,23 158:12 159:4,8,22 159:24 160:19,20 161:12,21 162:1 162:13,15,19,20 162:23,25 163:13 164:23 165:7,9,11 165:17 166:1 169:18,25 170:12 171:5,12 173:16 174:9 176:2,3 179:18 185:14 187:19 <b>thinking</b> 166:5 <b>thinks</b> 148:15 <b>third</b> 4:17 13:1 172:22 173:11 175:23,25 180:14 184:19 185:5 <b>this'll</b> 169:11 <b>thomas</b> 4:13 5:6 90:20 105:23 <b>thought</b> 10:8 12:16 17:14 45:24 69:19 111:14 115:17 140:9 148:7 176:22	<b>three</b> 13:8 17:1 24:19 28:11 29:14 64:22 66:16 67:24 110:2,2 135:6 140:11 <b>threshold</b> 101:13 <b>throw</b> 78:6 145:1 <b>thrown</b> 159:10 <b>thursday</b> 19:25 109:19 148:24 156:25 187:9 <b>tier</b> 180:14 181:4 181:4 <b>time</b> 19:22 22:9 27:16 39:14 63:1 67:10 70:14 76:10 94:2 98:9 99:14 107:6 109:21 115:6 121:3 122:19 124:8 127:7 128:7 130:1 130:2,4 132:7 139:12 141:8 142:8,8,13,13 147:19 148:3 156:19 157:7 163:22 164:19 165:10 179:18 181:14 <b>timing</b> 13:10 134:1 165:8 <b>title</b> 177:10 <b>tmt</b> 93:10,13 97:5 <b>today</b> 17:23 22:3 57:18 61:9 68:4 79:9 95:20 109:19 122:12 123:12 143:8,11 147:6 148:5,11 164:13 165:24,24 166:20 174:9 178:9 180:9 180:9 181:16 186:16,21	<b>toggle</b> 57:20,22 58:21,24 61:10 65:18,20,23 66:3 66:8 69:4,7 80:9 80:11 81:1,2 83:4 83:17 95:3,4 96:25 <b>told</b> 55:2 69:19 141:14 158:3 166:1 <b>tom</b> 129:17 <b>tone</b> 151:14 <b>top</b> 51:6 73:19 86:7 87:20 88:3 103:23 112:5 <b>topic</b> 185:12 <b>tos</b> 64:10 <b>total</b> 58:2 86:10 163:6 178:24 <b>totally</b> 86:10 <b>touch</b> 70:10 <b>touched</b> 70:16 <b>tough</b> 117:12 <b>touting</b> 107:8 <b>toys</b> 183:18 <b>trace</b> 132:4 141:17 <b>traceable</b> 136:17 <b>tracing</b> 99:4,8,11 <b>track</b> 28:19 32:17 33:8 36:22 37:19 40:19 41:3 43:4,6 44:19,21 62:22 119:11 <b>tracks</b> 157:13 <b>trade</b> 5:17 24:11 25:3 28:4 98:17 156:12,12,16,16 157:4,5 <b>traded</b> 57:5 <b>trading</b> 59:5 <b>trailer</b> 93:13 97:5
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<b>train</b> 157:13 <b>tranche</b> 89:25 <b>transaction</b> 38:10 49:13 63:22 84:12 <b>transactions</b> 25:1 29:1,12 30:19 32:11 33:1 34:11 37:22,25,25 38:3 38:9 41:17 62:9 62:25 99:4,9 110:18 <b>transcribed</b> 2:25 <b>transcript</b> 34:9 189:4 <b>transfer</b> 71:4 103:9,9 139:18 146:4 <b>transferee</b> 71:2,3 72:1,2,2,3 <b>transferred</b> 71:4 140:6 <b>transferring</b> 40:17 <b>transfers</b> 32:3 40:20 77:3 99:1 <b>transform</b> 5:2 56:22,24 69:14,15 69:16 120:2 167:23,24 169:11 171:13 <b>transform's</b> 120:4 <b>transier's</b> 179:6 <b>treasury</b> 27:13 48:21 50:17 <b>treat</b> 154:22 182:18 <b>treated</b> 59:16 154:24 155:1,3 175:24 179:12 185:3 <b>treating</b> 91:12 172:22	<b>treatment</b> 59:19 91:25 92:17 177:8 178:3 180:18 181:20,24 183:23 <b>tremendous</b> 58:12 <b>triggered</b> 150:22 <b>troubled</b> 76:25 <b>true</b> 13:20 39:11 145:3 149:8,17 162:22 174:1 189:4 <b>trust</b> 7:10 14:22 15:5,10 17:21 59:17,25 60:3 64:13 74:7 75:5 88:9 89:14,23 92:3 96:12 98:15 98:16 101:19,21 104:5,22,24 108:4 111:6,16 113:18 113:18 114:12,17 114:20,25 115:8,9 115:20,23 116:2,7 116:8,21,23,25 117:3,21 118:22 119:24 121:8 125:18 130:6,10 130:20 131:22 132:8 133:15 135:14,24 136:2 136:19 137:5,25 138:8,15 139:18 139:20,21,21 140:7,8,15 142:8 142:9,11,14,15,17 143:16 153:8 154:21 162:24 177:3 <b>trustee</b> 7:11 17:21 65:14 73:3,25 74:3,14 75:6,7,11 75:14 87:11 88:2 88:14 98:17	101:22 105:12,16 184:13 <b>trustee's</b> 16:12 72:24 166:21 <b>trustees</b> 16:18 59:15,20,21 60:1 60:8,15 61:2 65:15 74:13 89:1 140:11 154:18,23 <b>trustee's</b> 87:10 133:6 <b>trust's</b> 104:3 105:8 <b>truth</b> 150:25 <b>try</b> 23:9 61:21 63:7 71:3 113:11 159:8 168:19 175:7 <b>trying</b> 30:12 52:9 73:10 120:16 172:20 173:5 <b>tuesday</b> 120:25 <b>turn</b> 26:8 61:22 <b>turned</b> 29:20 <b>turning</b> 31:7 <b>tweed</b> 4:8 <b>twenty</b> 124:21 <b>twice</b> 109:7 <b>two</b> 12:21 23:24 33:3,4 59:9 62:5 67:12 68:9 69:9 70:10 73:25 77:22 92:8 96:20 98:11 99:8 103:16 115:12 123:18 129:20 130:1 132:15 133:23 139:17 148:21 151:21 153:7 155:15 179:19 183:24 186:8 <b>tx</b> 4:4	<b>type</b> 28:12,17 32:25 35:13 48:6 137:16 183:20 <b>types</b> 29:12 77:2 89:2 99:4 <b>typically</b> 36:23 56:7
<b>u</b>			
<b>u.s.</b> 1:23 93:13 133:6 166:21 <b>u.s.c.</b> 184:21 <b>ucc</b> 108:2 110:16 118:17 <b>ucc's</b> 109:7 <b>ultimate</b> 46:16 53:14 72:6 95:7 103:24 147:18 186:7 <b>ultimately</b> 37:9 47:19 54:15 57:16 74:10 95:1 99:6 100:20 114:13 121:10,13 <b>uncertainty</b> 99:7 186:4 <b>unclear</b> 128:24 <b>uncontroverted</b> 62:23 65:8 179:7 <b>underneath</b> 32:6 <b>understand</b> 21:7 21:20 30:12,18,22 32:11 37:1 40:10 41:23 42:1 47:5 55:14,18 56:24 63:19 65:11 73:16 74:19 78:25 88:11 106:15 118:19 119:4 124:1 127:13 131:24 138:21 152:21 155:4 160:7 161:4 161:6 166:6 171:13 182:23			

<b>understanding</b> 27:18 33:12,13 35:3 39:21,24 41:9 56:22 165:8 174:6 <b>understood</b> 34:9 35:2,15 151:25 <b>undertaken</b> 35:22 93:17 <b>undue</b> 92:17 102:8 <b>unduly</b> 94:9 101:8 102:7 185:9 <b>unfair</b> 55:9 91:25 <b>unfairness</b> 164:9 <b>unfortunately</b> 164:25 <b>unhappy</b> 77:25 145:8 <b>unique</b> 104:18 <b>unit</b> 92:10 <b>united</b> 1:1,12 184:13 <b>unknowable</b> 147:18 <b>unnecessary</b> 50:1 <b>unquote</b> 147:4 <b>unrealistic</b> 158:4 <b>unreasonable</b> 80:21 97:2 <b>unreasonably</b> 95:5 <b>unrelated</b> 113:9 <b>unreported</b> 93:20 <b>unscramble</b> 48:13 <b>unsecured</b> 3:4 19:1 20:16 54:19 54:22 56:4 62:2 71:21 90:11,14 91:16 95:6 100:25 101:1,11 102:17 104:13 106:3,6 119:22 159:3	167:13 181:1 184:10 <b>untangle</b> 63:7,10 <b>untethered</b> 17:11 <b>unusual</b> 26:6,16 26:17 51:1 104:10 <b>update</b> 16:5 <b>updated</b> 14:17 <b>updates</b> 10:8 <b>upshot</b> 109:21 <b>upside</b> 77:13 <b>use</b> 56:11 69:9 74:12 95:11 116:7 132:6,6,8 135:23 177:4 <b>uses</b> 118:15 <b>usual</b> 26:23	<b>vice</b> 99:2 <b>vietnam</b> 6:6 <b>view</b> 32:8 55:22 56:7 77:20 83:24 110:1 111:24 149:3 160:17 169:17 185:23 <b>views</b> 60:15 <b>vii</b> 86:20 <b>village</b> 7:2 <b>violated</b> 104:6 <b>violates</b> 98:2 <b>virtue</b> 68:11 106:5 112:19 <b>vis</b> 43:9,9 <b>volume</b> 29:1 <b>voluntary</b> 172:11 <b>vote</b> 55:10 81:16 101:10 <b>voted</b> 80:15,17,19 104:16 167:15 <b>votes</b> 58:24 <b>voting</b> 55:12,16 55:21 101:15,25 104:16 184:10 <b>vsg</b> 175:25	<b>walk</b> 131:1 <b>wall</b> 143:16,17 <b>wander</b> 4:20 10:14 11:10,13 156:15,18 157:3 158:3 <b>wander's</b> 11:20 <b>want</b> 17:19,20 18:7 23:19 38:2 42:1 47:14,15,19 55:25 60:8,20,22 61:6 70:9 73:4 74:14,19 80:4,22 87:10 106:23 107:19 108:9 109:17 119:11,13 131:9 132:6 135:5 135:5,6,10 137:4 137:8 141:9 144:4 144:10 146:1,2,18 152:17 154:21 156:6 159:13 163:3,14 167:3 169:18 175:8 186:22 <b>wanted</b> 14:25 16:4 57:5 58:15 67:20 69:15,18 115:13 136:14 152:7 154:17 155:19 170:8,9 171:9 173:8 <b>wants</b> 65:16,16 67:17 73:3 132:8 169:8 <b>war</b> 150:14 <b>warranted</b> 104:3 <b>wasn't</b> 123:10 126:21 <b>waterfall</b> 22:15,20 22:22 107:7,11 <b>way</b> 12:14 28:24 38:12 43:5,12
	<b>v</b> 92:3 <b>valid</b> 176:19 <b>validity</b> 11:23 <b>value</b> 21:2 22:15 22:17,21 54:9 71:3,22 72:11 <b>various</b> 31:3 58:5 71:10,14 73:14 76:23 85:12,25 96:1 106:5 107:9 107:10 120:14 126:9 147:9 149:14 <b>vedder</b> 7:1 <b>vehicle</b> 175:22 <b>vendor</b> 156:16 157:4 <b>vendors</b> 156:12 <b>veritext</b> 189:20 <b>versa</b> 99:2 <b>version</b> 36:10 59:14 95:7 96:16 <b>veto</b> 80:10 <b>viable</b> 136:5	<b>w</b> <b>w.d.</b> 162:20 <b>wacker</b> 5:10 <b>wait</b> 108:14 110:13,22 145:5 181:7 <b>waiting</b> 110:14 185:22 <b>waivable</b> 66:25 <b>waive</b> 96:24 <b>waived</b> 66:19 67:11 68:13,23 69:21 70:2 <b>waiver</b> 10:22 67:3 67:13,21 68:25 <b>walancik</b> 8:5	

47:6,7 50:25 51:1 51:25 57:11,11 59:10 63:4 65:16 68:8,25 73:2 77:19 81:15 83:24 83:25 84:1,3 98:25 106:18 113:7 117:15 126:23 127:18 136:4 148:19 154:19 155:23 172:11 173:2 176:23 183:14 <b>ways</b> 64:8 136:5 <b>we've</b> 12:1,20 13:2,10,25 14:21 15:16 18:21 34:16 51:18 59:6 65:3 67:9 70:2,2 152:3 159:14 169:11 171:3 174:10,14 174:25 186:17 <b>week</b> 10:13 12:23 111:3 121:1 157:9 178:22 <b>weekend</b> 11:22 17:12 156:20 187:16 <b>weeks</b> 17:1 <b>weil</b> 3:12 4:1 10:5 61:20 168:16 169:19 <b>went</b> 21:24 30:21 32:18 38:15 40:24 48:18,20 56:1 62:9,10 70:18,19 70:19 101:10 134:2 141:13 155:19 158:25 159:6 <b>we'll</b> 82:16 120:12 131:24,25 132:2	<b>we're</b> 82:3,25 83:10 90:10 117:19 127:19 128:7 130:2 131:18 <b>we've</b> 110:7,8 113:10 129:5 <b>whatsoever</b> 168:25 <b>what's</b> 107:22 135:17,19 <b>whichever</b> 25:1 41:14 58:1 <b>white</b> 1:14 92:15 <b>who've</b> 28:17 <b>wildly</b> 83:12 <b>william</b> 8:25 <b>willing</b> 57:4 <b>wilmer</b> 5:15 145:21 <b>wilmington</b> 7:10 17:21 64:13 89:23 96:12 98:15,16 101:18,21 104:3,5 104:22 105:2,8 153:8 154:21 <b>wilson</b> 183:10 <b>win</b> 142:24 143:2 161:23 <b>wind</b> 47:19 <b>winddown</b> 112:3 <b>winn</b> 55:15 78:18 93:18 94:17 100:7 102:2 <b>winner</b> 82:10 <b>winning</b> 143:5 <b>withdrawal</b> 107:3 <b>withdrawn</b> 166:16 171:18 172:4 <b>withdraws</b> 11:8 <b>withheld</b> 95:5 117:22	<b>witness</b> 23:7 <b>witnesses</b> 109:23 178:17 <b>won</b> 137:7 <b>wondering</b> 90:25 <b>won't</b> 88:15 107:14 <b>word</b> 31:22,23 140:4 157:2 <b>worded</b> 81:15 104:23 <b>words</b> 41:19 47:2 111:9 122:2 <b>work</b> 30:13 44:6 76:8 89:15 105:1 105:12 106:25 109:6 112:20 113:1 115:3 151:17 156:5 165:3 <b>worked</b> 73:2 129:22 169:11 <b>working</b> 14:20 16:4 66:18 67:9 73:11 167:23 168:18 170:23 <b>works</b> 63:5 68:8 110:23 <b>world</b> 5:17 11:24 27:11 131:22,23 175:14 <b>worldcom</b> 53:17 54:18,22 91:19 93:23 97:4 <b>worldwide</b> 176:3 176:6 <b>worried</b> 41:21 <b>worth</b> 71:22 126:20 <b>wouldn't</b> 104:17 130:8 <b>would've</b> 104:13	<b>wrap</b> 79:14 <b>wrapped</b> 116:15 <b>wrinkle</b> 111:4 <b>writing</b> 75:15 <b>written</b> 24:11 25:3 35:17 76:4 122:25 <b>x</b> <b>x</b> 1:4,10 44:4 63:11 <b>y</b> <b>y</b> 44:5 63:12 <b>yeah</b> 16:1 25:8 43:8 86:9,23 87:24 90:8 116:3 137:17,20 138:10 158:15 166:10 171:1 176:4 <b>year</b> 64:19 99:13 149:18 150:10 164:5 167:20 <b>years</b> 49:13,14,14 110:2 149:25 179:19 <b>yep</b> 74:18 <b>yield</b> 92:17 <b>york</b> 1:2 3:6,15 4:11,18 5:4,19 6:10,17 7:5,13 92:2 149:22 <b>you'd</b> 80:25 87:6 132:16 <b>you're</b> 77:17 85:8 86:13,23 87:1,3 90:16 106:12,13 108:22 113:23 115:11 119:25 120:5,16 132:17 133:7,10 136:1 <b>you've</b> 88:18 107:12 109:14
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[z - à]

Page 47

<b>z</b>
<b>z</b> 44:5 63:13 <b>zach</b> 3:10 <b>zero</b> 38:1,4
<b>à</b>
<b>à</b> 43:9